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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1987

SYLVIA AVERBACH,

Petitioner

v.

RIVAL MANUFACTURING CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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6 PP

QUESTION PRESENTED

MAY A PERSON INJURED BY A LITIGANT'S FRAUDULENT DISCOVERY TACTICS MAINTAIN A RICO SECTION 1964(C) CLAIM AGAINST THE LITIGANT WHO HAD ARGUABLY "PARTICIPATED" IN THE COURT ENTERPRISE FOR SECTION 1962(C) PURPOSES?

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PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT

Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit Court of Appeals opinion is reproduced in the Appendix at page (A-1). The District Court's opinion is reproduced in the Appendix at page (A-14).

JURISDICTIONAL STATEMENT

The Third Circuit Court entered an order which dismissed Count One of petitioner's complaint and reinstated Count Two on January 20, 1987. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(a).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341 provides:

Whoever, having devised or intending to *devise any scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme or artifice or attempting so to do*, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years, or both.

18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such

scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18. U.S.C. § 1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or Officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly* or by threats or force, or by any threatening letter or communication, *influences, obstructs, or impedes*, or endeavors to influence, obstruct or impede *the due administration of justice*, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1961 (1) (B) provides in pertinent part:

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonius, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice) . . .

18 U.S.C. § 1961 (3-5) provides:

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962 (c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964(c) provides:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Federal Rule of Civil Procedure 9(b) provides in pertinent part:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Federal Rule of Civil Procedure 12(b) provides in pertinent part:

> Every defense, in law or fact to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Plaintiff Sylvia Averbach originally sued both defendant Rival Manufacturing and S. Klein Department Stores in the Eastern District of Pennsylvania on April 21, 1978. Her Complaint alleged that she suffered a fire loss of $200,000 to her home in early 1977. Averbach contended that the source of the fire was a Rival electric can opener which she had purchased at S. Klein's during September, 1972. Both Fire Marshal Rebelo and expert witness Albert Meyers opined that the Rival product caused the fire which damaged Averbach's house. (A-19,20)

Following discovery which sought to learn if other Rival electric can openers had caused fires (A-23,24), the parties proceeded to trial on the Averbach complaint. A District Court jury rendered a verdict in favor of defendant Rival Manufacturing on June 6, 1981. (A-31) Plaintiff Averbach did not appeal the verdict. (A-31)

During 1983-84 plaintiff's counsel learned that defendant Rival did not report over 25 incidents where Rival electric can openers caused fires between 1968-80. (A-32,34) Defendant Rival Manufacturing failed to report these product fires when answering Interrogatories on July 1, 1979, September 14, 1979, and April 10, 1980, during the discovery phase of the original action. Rival's interrogatory answers mentioned only one fire incident aside from the plaintiff's claim. (A-24,A-30)

Consequently, the trial jury and judge never knew that defendant Rival's product was responsible for numerous fires prior to the June 6, 1981 verdict.

Seeking a new trial, plaintiff Averbach filed a Fed. R. Civ. P. 60(b) motion on September 28, 1984. (A-2) Because the motion was filed more than one year after judgment, the District Court denied plaintiff's 60(b) effort. (A-2) On November 1, 1985, the Third Circuit affirmed the Rule 60(b) order. (A-2)

Plaintiff Averbach decided to file a new complaint in the District Court in May, 1985 while she appealed her Rule 60(b) motion. (A-) Averbach's new complaint consisted of an 18 U.S.C. § 1964 civil "RICO" claim and a state fraud claim. (A-2)

Plaintiff's RICO count alleged that Rival "engaged in a pattern of 'racketeering activity' as defined by Section 1961(1)(b)" when the defendant filed fraudulent interrogatory answers during the first suit. (A-37) This count contended that Rival's three filings were chargeable as mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. (A-37) Because defendant Rival had misled the Court and the jury, plaintiff's complaint argued that Rival "corrupted" the District Court "enterprise." (A-37)

Averbach's complaint contended that Rival's fraudulent discovery tactics significantly weakened her products liability case presentation. Had Averbach been able to supply evidence of the 25 Rival can opener fires to the jury, she might have received a favorable verdict (A-37) that would have given her a damage award. Instead, Averbach suffered an economic injury by not recovering due to Rical's prohibited RICO activity. (A-20)

On November 18, 1985, the District Court granted Rival's Fed. R. Civ. P. 12(b)(6) motion and dismissed both counts of Averbach's complaint. Holding that defendant Rival did not "participate" in the District Court's affairs for Section 1962(c) purposes, the trial court below also dismissed Averbach's state claim for failing to allege 28 U.S.C. § 1332 diversity jurisdiction. A-17)

Averbach then attempted to amend her complaint on November 27, 1985, by specifically asserting that Rival's fraudulent discovery activity violated the Section 1503 obstruction of justice provision as well as Section 1341 (mail fraud) and Section 1343

(wire fraud). The District Court denied Averbach's amendment motion.

On March 12, 1986, the District Court below denied Averbach's motion for reconsideration of the November 18, 1985 order.

Both parties presented oral arguments to the Third Circuit Court of Appeals on October 14, 1986, following Averbach's appeal of the District Court order of November 18, 1985.

The Third Circuit filed an opinion on January 20, 1987. After affirming the District Court's dismissal of Averbach's RICO count, the Third Circuit reinstated her state law claim because diversity jurisdiction existed in fact and the plaintiff's complaint stated a cognizable claim. (A-6,12)

Plaintiff learned in March, 1987 that the Fifth Circuit Court of Appeals recently remanded *A.H. Recoulley, Jr. and St. Paul Fire and Marine Insurance Co. v. Rival Manufacturing Co.*, 86-4316, to the District Court for the Western District of Louisiana so the trial court could conduct further discovery, then proceed under Fed. R. Civ. P. 59 (A-41-42).

In *Recoulley*, a Rival executive testified at a 1984 deposition that he knew of only "two or three" Rival electric can opener fire claims and the executive further said that he did not believe that any of those claims involved litigation. (A-49)

Six days prior to the March, 1986 trial date, Recoulley's attorney learned about the present matter. Despite Recoulley's presentation of this newfound evidence, the District Court refused to grant a continuance. After conducting an electric can opener fire/products liability trial, the District Court rendered a verdict in favor of defendant Rival. In March, 1987 the Fifth Circuit remanded the matter back to the trial court because plaintiff had demonstrated Rival's arguable presentation of fraudulent evidence.

I. *Sedima said that RICO should be read broadly; the Third Circuit erred by dismissing plaintiff's §1964(c) suit because Rival participated in court affairs as a litigant and thus could have violated Section 1962(c).*

Plaintiff Averbach's private RICO action under Section 1964(c) was based upon defendant Rival's fraudulent interrogatory answers during her original products liability suit. Averbach alleged that Rival corrupted the District Court which is an "enterprise" under Section 1961(4) of RICO. (A-37) Plaintiff Averbach pleaded facts which show that defendant Rival violated RICO Section 1962(c) by participating in the conduct of the District Court's affairs "through a pattern of racketeering activity."

Defendant Rival's Section 1961(1)(B) "racketeering activities" consisted of obstruction of justice, mail fraud and wire fraud. Because Rival filed fraudulent interrogatory answers upon three occasions within a ten year period, Rival engaged in a Section 1961(5) "pattern of racketeering activity."

According to RICO Section 1964(c), a person "injured in his business or property" by a Section 1962 violation may sue for treble damages. Because plaintiff Averbach was unable to present evidence of over 25 Rival electric can opener fires to the court during trial due to Rival's discovery fraud, Averbach claimed that she suffered an economic loss due to that trial's adverse verdict. (A-20,37)

Plaintiff Averbach thus alleged the necessary facts for a Rival Section 1962 violation in her complaint. According to the Supreme Court:

> If a defendant engages in a pattern of racketeering activity in a manner forbidden by (Section 1962) . . . and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. ____, 105 S.Ct. 3275, 3285 87 L.Ed 2d 346 (1985).

Despite plaintiff Averbach's seeming allegation of the necessary facts for a Section 1964(c) claim, the District Court granted Rival's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Averbach's RICO claim, and the Third Circuit affirmed the order. (A-5,17)

Under *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), actions can be dismissed only if no doubt

remains as to plaintiff's incapability of proving the facts which support his claims to relief.

Focusing on the language of Section 1962(c), the District Court held that defendant Rival did not "conduct or participate" in the original trial court's affairs when it granted Rival's 12(b)(6) motion on November 18, 1985. (A-17) The District Court said that "Rival does not share a 'common purpose' with the U.S. District Court." (A-16,17) Because litigants "do not . . . direct or shape the policies of the court," the District Court felt that Averbach could not prove the facts necessary to sustain a Section 1964(c) action. (A-17).

When the Third Circuit confronted Averbach's RICO action on appeal, it agreed with her contention that the District Court could be a RICO enterprise (A-4). However, the Third Circuit said that courts have been recognized as RICO enterpises only when court personnel "corrupt the operation of the courts' own processes." (A-4)

Somehow the Third Circuit made the following statements as it prepared to afirm dismissal of Averbach's RICO claim:

> If the information . . . about fires begun by Rival electric can openers is true, the answers to interrogatories served in the underlying action are grossly false . . . If Averbach's allegations are true, no more occurred with respect to the enterprise in question than to mislead those who conducted it. (A-4,5)

RICO Section 1503 says that "whoever corruptly . . . obstructs or impedes . . . the due administration of justice" commits the sort of racketeering activity prohibited by RICO. Sections 1341 and 1343 say that whoever devises "any scheme or artifice to defraud" by means of mail delivery or wire communication also commits RICO racketeering activity.

Despite RICO's language, however, the Circuit Court has said that defendant Rival merely misled the District Court for the Eastern District of Pennsylvania from the first mailing of fraudulent interrogatory answers on July 1, 1979 until the jury verdict of June 6, 1981.

Although Section 1962(c) says nothing about what constitutes "participation" *in enterprise affairs*, the Third Circuit felt that defendant Rival's questionable behavior was not "equivalent to the participation in the [court's] affairs required by 18 U.S.C. § 1962(c)." (A-5)

In *Sedima S.P.R.L. v. Imrex Co., Inc.*, supra, the Supreme Court unequivocally stated that:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . . [t]he statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity . . . Far from effectuating these purposes, the narrow readings offered . . . would in effect eliminate § 1964 from the statute. 105 S. Ct. at 3286.

Allowing defendant Rival to mislead a federal district court hardly effects the legislative purpose of RICO noted in *Sedima* and *United States v. Turkette*, 452 U.S. 576, 586-587, 101 S. Ct. 2425, 2530-2531, 69 L.Ed.2d 246 (1981). Because defendant Rival did not collect a paycheck from the United States District Court, the courts below decided that Rival was not "employed by or associated with" the court enterprise.

Perhaps defendant Rival was not employed by the District Court, but one wonders how a litigant cannot at least be "associated with" a district court for RICO purposes. If the RICO statute is read broadly, one would have to labor mightily to prove a Rule 12(b)(6) motion contention that Rival was not "associated with" the District Court affairs.

In *U.S. v. Walasek*, 527 F.2d 676 (3rd Cir. 1975); *U.S. v. Faudman*, 640 F.2d 23 (6th Cir. 1981); *U.S. v. McComb*, 744 F.2d 555 (7th Cir. 1984); *U.S. v. Langella*, 776 F.2d 1078 (2nd Cir. 1985) and *U.S. v. Lench* 806 F.2d 1443 (9th Cir., 1986) defendants either destroyed, concealed or falsified evidence sought by federal grand juries. In each instance, the Circuit Court affirmed a Section 1503 obstruction of justice conviction because the defendants misled or attempted to mislead a grand jury.

If the Third Circuit's holding below is followed, a litigant such as Rival can violate Sections 1503, 1341 and 1343 by inducing a district court employee to doctor interrogatory answers by giving "grossly false" numbers when responding to an interrogatory answer regarding electric can opener fires. Such "racketeering activity" triggers Section 1962(c) is a plaintiff shows a Section 1961(5) "pattern."

By contrast, if Rival commits the above prohibited racketeering activities by itself while litigating in front of the same district court, the Third Circuit has advised us that plaintiff cannot prove that Rival violated Section 1962(c). This holding simply does not square with the decisions in *Haroco v. American National Bank and Trust of Chicago*, 747 F.2d 384 (1984), aff'd, 473 U.S. ____, 105 S. Ct. 3291, 85 L.Ed.2d 437 and *Sedima*, supra.

The Supreme Court reversed the Second Circuit's affirmation of a Rule 12(b)(6) ruling in *Sedima* and the same court agreed with the Seventh Circuit's reversal of a Rule 12(b)(6) in favor of the defense in *Haroco*.

Here the plaintiff should be given an opportunity to prove her Section 1964(c) claims because she has certainly alleged sufficient facts to withstand a Rule 12(b)(6) motion. If the courts below are not sure about defendant Rival's participation in the court "enterprise", then they can prepare an appropriate instruction at trial.

If the courts below are concerned about the recent expansion of private RICO actions, they should not usurp Congress' power to legislate by reading RICO narrowly. In *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), cert. denied, 464 U.S. 1002, 1003, 104 S. Ct. 508, 509, 78 L.Ed.2d 698 (1983), the Seventh Circuit noted that it is not the judiciary's role "to reassess the costs and benefits associated with the creation of [Section 1964(c)]." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, (2nd Cir. 1983), cert. denied, 465 U.S. 1025, 104 S. Ct. 1280, 79 L.Ed.2d 684 (1984), quoted the above language and then also quoted a civil RICO article:

> "[Courts should not] create standing requirements that would preclude liability in many situations in which legislative intent would compel it. Complaints that RICO may effectively federalize common law fraud . . . are better addressed to Congress than to courts. *Civil RICO; The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982)."

Justice White echoed the above arguments during his *Sedima* majority opinion:

> The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued . . . It is true that private civil actions . . . are being brought against such defendants, rather than the archetypal, intimidating mobster. Yet this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress. 105 S. Ct. at 3287.

Perhaps the courts below dismissed the plaintiff's Section 1964(c) complaint because they found it to be defective under Federal Rule of Civil Procedure 9(b)'s pleading requirement. Averbach did not allege obstruction of justice as a Rival racketeering activity in her complaint, but she did try to specifically assert Section 1503 in her Motion to Amend the Complaint. In *Kempe v. Monitor Intermediaries*, 785 F.2d 1443, 1444 (9th Cir. 1986), the Ninth Circuit said the plaintiff's failure to "incorporate mail and wire fraud allegations within the RICO count . . . was readily correctable by amendments." Plaintiff attempted to correct her omission of "obstruction of justice" with an amendment motion. (A-)

Haroco v. American National Bank and Trust Co. of Chicago discussed the pleading standard that a civil RICO plaintiff needs to meet in order to avoid dismissal:

> There can be little doubt that . . . Rule 9(b), which requires that allegations of fraud specify with particularity

> the circumstances of the alleged fraud, applies to fraud allegations in civil RICO complaints . . . In this case, the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved. In addition, the identification of the transactions and the description of the alleged scheme to defraud put defendants on fair notice of the time and place of the alleged false representations . . . The complaint here therefore satisfies Rule 9(b). *Haroco*, supra, 747 F.2d at 405.

Plaintiff Averbach's complaint meets the pleading standard of *Haroco* and thus should not be dismissed on a Rule 12(b)(6) motion. Her complaint spelled out the content of Rival's false interrogatory answers and described Rival's scheme to defraud with times and places. Rival knows from Averbach's complaint that it allegedly filed false answers in the District Court on July 1, 1979, September 14, 1979, and April 10, 1980. (A-20,24,29)

Rival also knows that Averbach alleged that Rival's scheme to defraud injured plaintiff economically by not allowing her to present evidence of the can opener fires to the District Court jury during trial. Averbach should be allowed to prove if the "grossly false" answers denied her a just verdict.

Both the RICO legislative purpose and the Supreme Court's *Sedima* opinion support the reinstatement of plaintiff Averbach's Section 1964(c) claim against defendant Rival. Plaintiff has alleged a "pattern of racketeering activity" which litigant Rival conducted through the District Court.

Both the courts below have attempted to dismiss Averbach's claim by arguing that a litigant cannot "participate" in the court's affairs for RICO purposes.

The courts below are attempting to create a RICO standing requirement which would preclude liability. Why should the plaintiff be denied her right to sue under the broad RICO statute because defendant Rival does not have standing under § 1962(c)? Because RICO's purpose is to remedy misconduct such as Rival's, the Supreme Court should give plaintiff Averbach the opportunity to prove her Section 1964(c) allegations.

CONCLUSION

For the above reasons, plaintiff/petitioner hereby requests this Court to grant his writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1196

SYLVIA AVERBACH,

Appellant

v.

RIVAL MANUFACTURING CO.
(D.C. Civil No. 85-2794)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: October 14, 1986
Before: GIBBONS and BECKER, *Circuit Judges*
and BROWN, *District Judge**
(Opinion Filed: January 20, 1987)

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*Honorable Garrett E. Brown, Jr., United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Sylvia Averbach appeals from an order dismissing, pursuant to Fed. R. Civ. P. 12(b), her complaint seeking relief from a judgment. The judgment from which she seeks relief was entered in favor of the defendants in a product liability action in the United States District Court for the Eastern District of Pennsylvania, *Averbach v. Rival Manufacturing Company*, Civil No. 78-1350, following a jury verdict on June 5, 1981. No appeal was taken from that judgment. On September 28, 1984 Averbach filed a Fed. R. Civ. P. 60(b) motion seeking a new trial. That motion was denied because it was filed more than a year after the judgment from which relief was sought, and this court affirmed on November 1, 1985. While the appeal was pending this separate action was filed in May, 1985. It pleads two counts: violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. (1982 & Supp. III. 1985) (RICO), and common law fraud. We hold that the RICO count fails to state a claim upon which Averbach may obtain relief from a judgment. We also hold that the common law fraud count would permit proof of facts which could afford relief from a judgment, that there was subject matter jurisdiction of that count, and that it should not have been dismissed at the pleading stage.

I.

In the underlying action Averbach sought to recover damages resulting from a fire in her home which, she claimed, was caused by a defective Rival electric can opener. During discovery in that action Averbach served on Rival Manufacturing Company an interrogatory asking:

> If the Defendant has within the past five years received any complaints of an occurrence similar to that allegedly experienced by the Plaintiff, please state for each such complaint:

(a) Its date;

(b) Its substance, including a description of the factual circumstances;

(c) The name and address of the person making the complaint.

Plaintiff's Interrogatories, Civ. No. 78-1350 at 10. Rival Manufacturing Company, on July 1, 1979, responded:

(a) December 7, 1976.

(b) The claim was for property damage to a house. It was alleged that a Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. The evidence did not support the claimant's allegations, the claim was denied by the Comnpany and dropped by the claimant.

(c) This was a subrogation claim by State Farm Fire and Casualty Company, 5725 Foxridge Drive, Shawnee Mission, Kansas 66202.

Defendant Rival's Answers to Plaintiff's Interrogatories, Civ. No. 78-1350 at 5-6. No other occurrence was disclosed. A similar interrogatory served on Rival Manufacturing Company by a cross-claimant, the retail seller of the can opener, S. Klein Department Stores, was answered identically. Thus Averbach was informed of a single fire damage claim, made on behalf of a fire insurer, which that insurer apparently dropped after inquiry. At trial the jury decided in favor of the defendant.

In the instant action the complaint alleges that in August, 1983 Averbach's counsel learned that the Consumer Products Safety Commission had information about Rival electric can openers causing fires. Counsel obtained copies of the Commission's records which disclosed that between 1968 and 1974 Rival Manufacturing Company received 23 complaints of fires, 22 of which involved Rival electric can openers. In 1975 two more fires were brought to Rival's attention and in 1976 two others were reported. In addition, after the date of the answer to the interrogatory but before trial Rival received reports of fires started by

can openers in California, Chicago, and Philadelphia. All of these reports indicated that the arrangement of the electric switch was such that the device remained on at low speed when not in use, causing a heat buildup to the point of combustion.

If the information from the files of the Consumer Products Safety Commission about fires begun by Rival electric can openers is true, the answers to interrogatories served in the underlying action are grossly false. Rival would have had complaints, as of July 1, 1979, of at least 26 similar occurrences, not the one incident that was disclosed. The complaint alleges that, had truthful answers been given, Averbach's presentation to the jury would have been much stronger, and could have produced a different verdict.

II.

In Count I Averbach alleges that by serving through the mails its false answers to interrogatories, Rival Manufacturing Company engaged in a pattern of racketeering activity, thereby corrupting an enterprise, the United States District Court for the Eastern District of Pennsylvania. The theory of the complaint is that the district court is an enterprise and that Rival Manufacturing Company, by serving the false answers to interrogatories, participated in the conduct of that enterprise's affairs, all within the meaning of 18 U.S.C. § 1962(c) (1982).

We agree that a court may be an enterprise within the meaning of RICO. *See United States v. Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 411 U.S. 913 (1979) (Pittsburgh Magistrates); *United States v. Vignola*, 464 F. Supp. 1091, 1095 (E.D.Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). (Philadelphia Traffic Court). In those cases in which courts have been recognized as RICO enterprises, however, the participants engaged in patterns of activities designed to corrupt the operations of the courts' own processes. Whereas litigants before courts call upon the courts to exercise the judicial process, they do not participate in it in the sense intended by Congress in 18 U.S.C. § 1962(c)

(1982). Such litigants do not share with the court's personnel a common purpose with respect to the activity complained of. Indeed Averbach's allegations suggest that while those responsible for conducting Rival Manufacturing Company's defense of product liability litigation may have had a common or shared purpose, that purpose was quite at variance with those of the judges and support personnel of the district court. If Averbach's allegations are true, no more occurred with respect to the enterprise in question than to mislead those who conducted it. That is not, in our view, equivalent to the participation in its affairs which is required by 18 U.S.C. § 1962(c) (1982).

Since Averbach's allegations fall short of a charge that Rival Manufacturing Company participated in the affairs of the district court, that court properly dismissed Count 1 of her complaint for failure to state a claim upon which relief could be granted.[1]

II.

The district court, having dismissed the RICO count as to which there was federal question subject matter jurisdiction under 28 U.S.C. § 1331 (1982), treated Averbach's common law fraud claim as a pendent state law claim. That claim was dismissed based on *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), which held that if federal claims are dismissed before trial, pendent state claims ordinarily should be dismissed as well. Thereafter Averbach moved to amend her complaint to rely upon diversity jurisdiction. The district court ruled that leave to amend was required because a Rule 12(b) motion had already been granted. *See* Fed. R. Civ. P. 15(a). In deciding the motion, the court considered whether the complaint as amended would survive a motion to dismiss, and concluded that it would not. Thus, purporting to apply the pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), the court ruled that the complaint failed to state a claim on which relief from a judgment could be obtained on the ground of common law fraud.

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1. Averbach did not plead, and does not here contend that Rival Manufacturing Company's affairs were conducted in such a manner as to make Rival an enterprise for RICO purposes.

In our view, leave to amend probably was not required because the complaint, although mentioning only 28 U.S.C. § 1331 (1982) and 28 U.S.C. § 1337 (1982), on its face may satisfy 28 U.S.C. § 1332 (1982), which confers diversity jurisdiction on the federal courts. It alleges that Averbach is a citizen of Pennsylvania and the amount in controversy exceeds $10,000. It pleads Rival's address in Kansas City, Missouri and refers to the underlying action which was a diversity suit. Thus Averbach's motion to amend may have been surplusage. Whether or not it was necessary, however, the motion must be considered in light of the direcftion that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," 28 U.S.C. § 1653 (1982). Since there unquestionably is diversity jurisdiction, and Rival Manufacturing Company always was aware of that fact, we will treat the complaint accordingly.

The next question we must address, therefore, is whether the complaint states a claim upon which relief from the instant judgment can be obtained on the ground of fraud. The district court, citing *Thomas v. Seaman*, 451 Pa. 347, 304 A.2d 134 (1973), referred to the five standard elements of a cause of action for fraud: (1) a misrepresentation of fact, (2) fraudulently uttered, (3) with intent to induce reliance, (4) and inducing justifiable reliance, (5) and to the injury of the injured party. The court concluded that "[t]he complaint fails to allege that defendants intended to induce action on the part of the plaintiff or that plaintiff justifiably relied upon the alleged misrepresentations," *Averbach v. Rival Mfg. Co.*, Civ. No. 85-2794 (E.D. Pa. Mar. 12, 1986). We cannot agree. The complaint explains that Averbach's theory in the underlying case, supported by the report of the Fire Marshal who investigated the fire, was that the fire started when a defective switch in the Rival electric can opener permitted the unit to continue operating when not in use, causing heat and ultimately combustion. It explains further that in the discovery stage, through the interrogatory quoted above, it sought information that is patently relevant to that theory, that Rival Manufacturing Company had such information in its possession with respect to 26 incidents consistent with that theory, and that the answer falsely referred only to one. It is

literally true that the complaint does not allege in *haec verba* that the interrogatories were served for the purpose of obtaining information for use in the preparation or presentation of Averbach's case, that Rival Manufacturing Company knew of such purpose, and that Rival Manufacturing intended to cause Averbach to rely on its false answer. After alleging that Rival was aware of facts inconsistent with that answer, however, the complaint charges:

> 33. It is clear from the foregoing evidence that Rival was not candid with the Plaintiff during the discovery process.
>
> 34. Had Rival been truthful in its answers to Interrogatories the Plaintiffs could have presented to the jury the fact that the Rival can opener fires were a common and serious problem known to Rival.

Plaintiff's Complaint, Civ. No. 85-2794 at 19. We find unpersuasive the proposition that the complaint was deficient in failing to allege the self-evidence purpose of asking for information under penalty of false swearing in the course of discovery, or the self-evident purpose of responding to a request for such information. As the complaint alleges, "[t]he acts and omissions of defendant described herein plainly constitute a scheme or artifice reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 20. Thus the district court's reason for finding the fraud count to be legally insufficient cannot be accepted.[2]

Alternatively, on the authority of Rule 60(b)(3), the district court reasoned that in an independent action seeking relief from

2. In determining whether a complaint states a cause of action we are bound to consider not only the statements in the pleading itself but also to draw reasonable inferences in favor of the pleader. Quinones v. United States, 492 F.2d 1269, 1273 (3d Cir. 1974). Here we infer that defendants are alleged to have made their false statements with the intention of inducing plaintiff to rely detrimentally thereon. We are therefore unwilling to hold that this complaint does not state a cause of action for purposes of Rule 12(b)(6). Upon remand plaintiff may wish to consider amending her complaint by pleading fraud with greater particularity. *See* Fed. R. Civ. P. 9(b).

a judgment brought more than a year after the one year time limit in Fed. R. Civ. P. 60(b), the plaintiff should have to prove more than would be appropriate for relief, within that period. That part of Rule 60 permits relief from a final judgment, on motion made within one year, for "fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). The court reasoned that unless something more was required in actions commenced more than one year after judgment, the one year limitation on Rule 60(b)(3) relief would be seriously compromised. Therefore, the court concluded, no independent action could be entertained for relief from a judgment after one year except for "fraud on the court" as distinguished from fraud on a party. Moreover, fraud on the court "did not include perjury," which is essentially what Averbach alleged, but only egregious misconduct that involves corruption of the judicial process itself.

There are several problems with this line of reasoning. The first is textual. The one year limit in Rule 60(b) applies only to three of six listed grounds for relief from judgment: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence, and (3) fraud. It does not apply to the catchall provision covering "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Moreover Rule 60 provides that "[t]his rule does not limit the power of a court to entertain an independent action to relief a party from a judgment, order, or proceeding . . ., or to set aside a judgment for fraud upon the court." Thus the one year time limit in the rule, by virtue of the rule's very text, does not apply to independent actions. The Note of the Advisory Committee on Rules is quite clear in this respect.

> If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore

> been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations.

Fed. R. Civ. P. 60(b) advisory committee note. The laches or statute of limitations to which the Advisory Committee Note refers are to the governing time bars under the law which give rise to the independent cause of action.

Nor does the rule purport to specify either the "other reasons justifying relief from the operation of a judgment" or the substantive rules which may authorize a court in an independent action to grant relief from a judgment. The reason for the absence of such a specification is plain. Prior to the adoption of Rule 60 both the substantive and the procedural law dealing with relief from judgment were complex. The Advisory Committee

> endeavored [in 1946] to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

Id. The change in 1946 thus was intended to eliminate the procedural complexities of the former practice, while preserving two alternative remedies, a motion or an independent action.

Prior to 1946, fraud was not an express ground for a Rule 60(b) motion, and a dispute arose over whether relief on that ground could be obtained by motion. Rule 60(b)(3) was added in that year, and the advisory committee explained:

> The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits.

Id. The advisory committee reference to established doctrine is to the substantive law, found elsewhere than in the Federal Rules of Civil Procedure, for relief from judgment.

> It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.

Id. Neither the text of Rule 60(b) nor its legislative history permits a construction which would limit an independent action for relief from a judgment to "fraud on the court" as distinguished from fraud of some other sort. Indeed such an attempt by the rulemakers to affect rights claimed under the substantive law would probably have exceeded the authority conferred in the Rules Enabling Act, 28 U.S.C. § 2072(1982). *See* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law; A General Approach*, 71 Cornell L. Rev. 733, 772 (1986).

One may reasonably ask what was the purpose of the drafters in subjecting Rule 60 (b)(1)(2) and (3) motions to a one year time limit if not to create a substantive time bar. The answer, as is so often the case with the Federal Rules of Civil Procedure, lies in the former practice. Prior to their adoption, there were terms of court, and certain common law methods of obtaining relief from judgments were deemed to be unavailable after the expiration of the term at which the judgment was entered. *E.g.*, *United States v. Mayer*, 235 U.S. 55 (1914). When both the terms of court and the common law writs were abolished, the time limit with respect to some motion equivalents of the former common law writs was substituted. *See* 11C. Wright & Miller, *Federal Practice and Procedure* § 2866, at 227 n.66 (1973). Under the old practice, however, the expiration of the term of court had no effect upon the timeliness of an independent action for relief from judgment. The rule carries forward this same principle. "The motion procedure is subject to a one year limit, which does not apply to the independent action for fraud." *Id.* § 2868, at 240.

Additionally, the separate treatment in Rule 60 of the somewhat confusing concept of "fraud on the court" as a distinct ground for relief is traceable to the well known decision in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S.

238, 248-49 (1944), *modified* in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam), in which it was held that a court has inherent power to set aside a judgment obtained by such a fraud, even in circumstances where the adverse party might be barred by laches or lack of diligence from obtaining relief. As the advisory committee explains:

> [T]he rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.* . . .

Fed. R. Civ. P. 60(b). What is required to trigger the court's inherrent power to grant relief even when equitable principles might bar a party from such relief has been a matter of controversy.

> Perhaps the principal contribution of all these attempts to define 'fraud on the court' and to distinguish it from mere 'fraud' is as a reminder that there is a distinction. Any fraud connected with the presentation of a case to a court is a fraud upon the court, in the broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b). The remedy for most cases of fraud must continue to be by motion under Rule 60(b)(3) or by an independent action, subject to the procedural limitations applicable to those remedies.

11 C. Wright & Miller, *Federal Practice and Procedure* § 2870, at 253 (1973) (footnotes omitted). Something more than ordinary fraud may be required in order to trigger the court's authority to disregard limitations on available relief in an independent action or equitable defenses to an independent action for relief from a judgment. The *Hazel-Atlas* rule, however, otherwise has nothing to do with the elements of a cause of action for such relief.

Rule 60(b)(3) covers all fraud "whether heretofore denominated intrinsic or extrinsic." No similar language appears in the saving clause which preserves the independent action. Its absence has led some courts to conclude that if relief from a judgment is sought by an independent action the old distinction

between "extrinsic" and "intrinsic" fraud persists.[3] A leading commentator notes, however, that

> [The distinction] is most unfortunate, if true. [It] rests on cloudy and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished on motions.

11 C. Wright & Miller, *Federal Practice and Procedure* § 2868, at 240-41 (1973) (footnotes omitted). Moreover, the "extrinsic"-"intrinsic" distinction which is based on a statement in *United States v. Throckmorton*, 98 U.S. 61 (1878), was overruled, if it was ever the law, by *Marshall v. Holmes*, 141 U.S. 589 (1891). The distinction probably would not in any event survive *Erie Railroad Company v. Tomkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), at least with respect to judgments in diversity cases. As *Guaranty Trust Co. v. York* makes clear, there is no longer a federal substantive law of equitable remedies. *Id.* Furthermore, even before the 1946 amendment to Rule 60(b), which added Rule 60(b)(3), the extrinsic-intrinsic fraud distinction was rejected by this court. *Publicker v. Shallcross*, 106 F.2d 949, 950 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940). *See also Bandai America Inc. v. Bally Midway Mfg. Co.*, 755 F.2d 70, 73 (1985), *cert. denied*, 106 S. Ct. 1265 (1986); *Schum v. Bailey*, 578 F.2d 493. 506 (3d Cir. 1978) (Gibbons, J., concurring). Thus we must reject Rival Manufacturing Company's argument, in support of the order appealed from, that its fraud, if any, was intrinsic.

Summarizing, we hold that Count II of Averbach's complaint, measured against the pleading standards of *Conley v. Gibson*, 355 U.S. 41 (1957), would permit proof of facts which would authorize relief from a judgment on the ground of fraud. We hold further that the elements of a cause of action for such relief in an independent action are not different from those elements in a Rule 60((b)(3) motion, and that the time limit on such

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3. *See e.g.*, Dowdy v. Hawfield, 189 F.2d 637 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951).

a motion does not apply to an independent action.[4] Moreover, since there is diversity of citizenship, there is a separate basis for subject matter jurisdiction over Averbach's independent action. Thus we need not consider whether an independent action for relief from a judgment falls within the ancillary jurisdiction of a federal court which rendered the judgment.

Given these holdiknqs with respect to Count II, we have considered whether the prior ruling of the district court denying Averbach's Rule 60(b)(3) motion, which this court affirmed, might afford a separate ground for affirmance. We hold that it does not. That ruling was predicted solely upon the timeliness of the motion. The legal sufficiency of the claim of fraud was not addressed. The time bar in Rule 60, as we have held, has no application to this lawsuit.

III.

The judgment appealed from will be affirmed insofar as it dismissed Averbach's Count I RICO claimn. It will be reversed insofar as it dismissed Averbach's common law fraud Count II, and the case will be remanded for further proceedings on that count.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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4. Judge Becker agrees that the fraud alleged in this case could be redressed in an independent action. Further, he confesses his inability to see any basis for distinguishing the elements of a 60(b)(3) action from those of an independent action. The only possible basis Judge Becker can envision for such a distinction is the difference between extrinsic and intrinsic fraud. This circuit has established, however, that the distinction is chimerical. *See* Publicker v. Shallcross, 106 F.2d 949 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940). Nonetheless, Judge Becker is not certain that the elements of an independent action to reopen a judgment for fraud are always identical to the elements of a 60(b)(3) action, as Judge Gibbons appears to hold. Judge Becker would prefer to reserve that issue.

DISTRICT COURT ORDER OF NOV. 18, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	Civil Action
v.	:	No. 85-2794
RIVAL MANUFACTURING COMPANY	:	Filed Nov. 19, 1985

MEMORANDUM OPINION AND ORDER

HUYETT, J. November 18, 1985

This is an action brought by plaintiff Sylvia Averbach pursuant to the federal Racketeer Influenced Corrupt Organization (RICO) statute, 18 U.S.C. § 1961 *et seq*. against defendant Rival Manufacturing Company. The instant action arises out of a products liability case wherein plaintiff alleged that the defective design and condition of an electric can opener caused a fire in her house resulting in $200,000.00 in damages. After trial before Judge VanArtsdalen, the jury returned a verdict for the defendant in June 1981.

Pursuant to 18 U.S.C. § 1964(c), plaintiff brings a civil RICO action for violation of 18 U.S.C. § 1962(c). Plaintiff also asserts a cause of action in common law fraud. Defendant now makes a motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons set forth below, this motion will be granted.

In deciding a motion to dismiss, I must accept all factual allegations in the complaint as true and resolve all reasonable inferences in the light most favorable to the non-moving party. *Miree v. DeKalb County*, 433 U.S. 25 (1977); *D. P. Enterprises v. Bucks County Community College*, 725 F.2d 943 (3d Cir. 1984). Dismissal is appropriate only when it appears beyond a doubt that the non-moving party can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

In September 1984, plaintiff filed a Rule 60 motion in the original products liability action seeking relief from the judgment

entered in 1981 on the grounds that defendant Rival had not been forthcoming and honest in response to plaintiff's discovery requests. Specifically, plaintiff had asked whether there were other claims or complaints about Rival electric can openers causing fires. Plaintiff received a negative response to this inquiry. Plaintiff has since learned that Rival was on notice that there were problems with their can openers. Rival contends that all previous complaints were related to a different model can opener and therefore were not relevant to plaintiff's action. The Rule 60 motion was denied in February 1985. The denial of this motion was appealed to the Third Circuit Court of Appeals which, by judgment order, affirmed the denial of the motion on November 1, 1985.

Plaintiff's theory of recovery is grounded in her assertion that Rival violated the civil provision of RICO, 18 U.S.C. § 1964(c) which states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover three fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Therefore, my analysis must begin with to a review of 18 U.S.C. § 1962(c) which states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Plaintiff alleges that Rival Manufacturing Company is a "person" within the meaning of 18 U.S.C. § 1961(3). She further alleges that the United States District Court for the Eastern District of Pennsylvania is an "enterprise"[1] within the meaning of 18 U.S.C. § 1961(4). Plaintiff goes on to allege that defendant has

1. For the purpose of the instant motion, we accept plaintiff's characterization of the United States District Court as an "enterprise." I need not reach this issue in resolving the matters before me.

engaged in a "pattern of racketeering activity," defined in § 1961(5), in that defendant's acts and omissions in answering interrogatories propounded by plaintiff and by S. Klein Department Stores, Rival's co-defendant in the underlying products liability action, violated 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud).[2]

Accepting plaintiff's factual allegations as true and without engaging in a lengthy discussion of the merits of plaintiff's above recited classifications, I will grant defendant's motion to dismiss. Section 1962(c) requires a RICO defendant to be "employed by or associated with an enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs . . ."

Rival is clearly not employed by the U.S. District Court. Section 1962(c) defines the term "associated with" as direct or indirect participation in the conduct of the enterprise. *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977). "While the terms 'person' and 'enterprise' are defined in the RICO statute and have been extensively litigated, the question of how much involvement must be shown before a defendant will be deemed a participant in an enterprise is not so clear." *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1411 (S.D. N.Y. 1984).

The question presented here is whether defendant Rival was, by virtue of its acts or omissions in answering plaintiff's and co-defendant's interrogatories, participating in the conduct of the United States District Court. The term "enterprise" has been interpreted to require "a common or shared purpose." *U.S. v. Lemm*, 680 F.2d 1193, 1198 (8th Cir.), *cert. denied*, 459 U.S. 1110 (1982); *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1411 (S.D. N.Y. 1984). The United States District Court for the Eastern District of Pennsylvania is a constitutionally created court for the purpose of dispute resolution. Rival does not share a "common purpose" with the U.S.

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2. The Supreme Court has recently stated in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, No. 84-648, slip. op. at 8 (U.S. July 1, 1985) that a conviction of the underlying predicate act is not necessary to maintain a civil RICO action.

District Court. Furthermore, Rival did not "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). The relationship of Rival to the U.S. District Court is no more and no less than that of any defendant before that court, and defendants do not, in any way, direct or shape the policies of the court nor can they in any way be responsible for its acts.

The cases cited by plaintiff are inapposite. The court in *United States v. Thompson*, 685 F.2d 993, 995 (6th Cir. 1982) addressed a situation involving the employees of the Office of Governor of the State of Tennessee and the alleged abuse of their connection to this office by accepting bribes for influencing the granting of pardons and paroles and delays or denials of extradition. In *United States v. Robinson*, 707 F.2d 872, 875 (6th Cir. 1983), the court stated that the Harlan County District Court was an enterprise for purposes of RICO, but in that case a judge of the court had been indicted for the RICO violation. A judge is clearly employed by or associated with the court and conducts or participates in its affairs. In *United States v. Davis*, 707 F.2d 880, 881 (6th Cir. 1983), the court held that the Mahoning County, Ohio Sheriff's office was an enterprise, but the defendants were employees of that office.

In the instant case no wrongdoing is alleged against the United States District Court and no judge or employee of this court is involved in the alleged wrongdoing. Mere use of the courts as a litigant does not satisfy the requirement that the defendant "conduct" or "participate" in the affairs of the enterprise. Thus, I will dismiss this action because Rival Manufacturing Company is not a participant in the conduct of the United States District Court.

Because I have already determined that the federal statutory claim against the defendants must be dismissed, the pendent state law fraud claim against them will also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

An appropriate order follows.

Daniel H. Huyett, 3rd, Judge

PLAINTIFF'S COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH, 610 B Elkins Park House Elkins Park, PA 19117 *Plaintiff,*	:	Civil Action No. 85-2794
v.	:	(Related Case No. 78-1350)
RIVAL MANUFACTURING COMPANY, 36th and Bennington Streets Kansas City, MO 64124 *Defendant*	:	Jury Trial Demanded

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COMPLAINT

Plaintiff, by her attorneys, brings this civil action to obtain compensatory, trebel, punitive damages, equitable relief, attorneys' fees, and the costs of suit from the defendants named herein, and complains and alleges as follows:

CAUSES OF ACTION

1. This action is brought pursuant to The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968 ("RICO"), to remedy the frauds perpetrated by defendants in the defense of their product liability claims.

JURISDICTION AND VENUE

2. This complaint is filed and these proceedings are instituted under 18 U.S.C. section 1961 *et seq*., particularly Section 1964(c) relating to civil liability for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); federal question jurisdiction, 28 U.S.C. section 1331(a); and 28 U.S.C. Section 1337 concerning statutes affecting commerce.

3. Plaintiff resides within the Eastern District of Pennsylvania; the unlawful activities herein alleged and out of which this action arises occurred, in part, within this District; defendants actively do business and engage in the unlawful activities alleged herein, in part, in this District; and the interstate trade and commerce hereinafter indicated is found, in part, within this District.

PLAINTIFF

4. Plaintiff Sylvia Averbach, lived at 610 B Elkins Park House, Elkins Park, PA 19117 and is an adult citizen of the Commonwealth of Pennsylvania.

DEFENDANTS

5. Defendants Rival Manufacturing Company and S. Klein Department Stores are regularly engaged in *inter alia*, the business of selling products to consumers for profit. They defended in Civil Action No. 78-1350 in this District.

GENERAL ALLEGATIONS

6. A prior action, Civil No. 78-1350, was instituted on April 21, 1978 arising out of a fire loss suffered by the Plaintiff.

7. The Plaintiff's Complaint alleged that the source of the fire that caused damage to her home was the Defendant's product, an electric can opener which she purchased during September, 1972. (Exhibit A)

8. Fire Marshal Adolph J. Rebelo stated in his report of April 4, 1977:

> "Mr. Meyers met me on the scene and I assisted him in dismantling the electric stove. After testing all of the stove's components and reconstructing its position of the fire, Mr. Meyers stated that the stove was not the cause of the fire. I was in agreement with him. The stove was removed to the garage. We then reconstructed the kitchen with the remains of the counters, cabinets and counter stove. Mr. Meyers noted that the counter that was along the

same wall oven had a heavy burn on the top of the counter and that the fire burned downward from this point. There was a badly burned "blob" in this area and, when this "blob" was dislodged from the counter, it was noted that this was the remains of an electric can opener. I was in full agreement with Mr. Meyers as to the cause of the fire and, based on his findings, I can readily concede that the fire following the initial fire caused by the electric can opener caused the shorting of the electrical system in the entire kitchen area." (Ex. A-6)

9. Albert S. Myers also stated:

"The apparent causative factor is a weakened spring associated with the operation of the handle of the opener. After some usage the spring weakens, thereby permitting the handle to drop onto the electrical on-off switch button that operates the can opener. The units do not have any internal thermal or fuse protection, so ultimately when they operate for an appreciable length of time, excess heat is developed and the plastic case on the unit melts. The heat generated through the continuous operation of the motor has proven to be sufficient to ignite nearby combustibles such as the plastic case. The fire is then transferred to adjacent wallpaper, plastic and wood counter tops, cook books, etc." (Ex. A-14)

10. The Plaintiff suffered property losses in excess of Two Hundred Thousand ($200,000.00) Dollars.

11. During the discovery stage of the above action the Defendant was asked to answer the following interrogatories on January 10, 1979 and the Defendant supplied the following Answers as of July 1, 1979:

QUESTION 12 — Did the Defendant design and develop the product? (Exhibit "B").

ANSWER — Rival designed and developed Rival Model 731/1 Can Opener/Knife Sharpeners. (Exhibit "C").

QUESTION 13 — If the answer to the preceding Interrogatory is in the affirmative, please state:

(d) The date and nature of each improvement made on the product for protection from damage or destruction due to fire. (Exhibit "B").

ANSWER — (d) Not applicable. (Exhibit "D").

QUESTION 15 — Please identify any local or national engineering or safety code standard relating to the design or production of the product.

ANSWER — Rival Model 731/1 Can Opener/Knife Sharpeners are produced in accordance with Underwriter Laboratories, Inc. Standard No.: UL982, Motor operated Household Food Preparing Machines. (Exhibit "C").

QUESTION 16 — With respect to those engineering or safety codes identified in answer to Interrogatory 15, please state which, if any concerned the arrangement and material composition of the on-off system. (Exhibit "B").

ANSWER — Rival Model 731/1 Can Opener/Knife Sharpeners are produced in accordance with Underwriters Laboratories Inc. Standard No.: UL982 Motor Operated Household Food Preparing Machines. (Exhibit "C").

QUESTION 17 — Please state if the Defendant ever furnished diagrams, blueprints, photographs, or similar descriptive material concerning the product or similar products and any safety features thereof at any time to the National Safety Council or the American Standard Institute. (Exhibit "B").

ANSWER — The Company has never been required to submit any such data to either the National Safety Council or the American Standard Institute, and has not done so. (Exhibit "C").

QUESTION 19 — Did the National Safety Council or the National Standard Institute at any time recommend to the Defendant the institution of any design modifications with respect to the arrangement and material composition of

the on-off switch for the protection from damage due to fire? (Exhibit "B").

ANSWER — No. (Exhibit "C").

QUESTION 23 —Please describe the types of investigations regarding the arrangement and material composition of the on-off switch that are made during the manufacturing and assembly of similar products.

ANSWER — (See Answer 22)

ANSWER 22 — Components purchased by the Company are inspected and/or tested when received by the Company. Components produced by the Company are inspected and/or tested at various stages of production. Testing and inspection procedures are developed by the Company and they meet or exceed those required by Underwriters Laboratories, Inc. Also, finished products and their components are inspected by Underwriters Laboratories, Inc. prior to commercial production of a new model and/or prior to the adoption of any significant change. Underwriters Laboratories Inc. also conducts follow-up inspections of products and production facilities to assure that production continues to be consistent with the construction of the product as originally listed by Underwriters Laboratories Inc.

As part of the procedures discussed above, every electrical product assembled by Rival is tested first for safety at 1,250 volts A.C. for one second. This test complies with standards established by Underwriters Inc. Each product is then operated at 120 volts A.C. to test its actual performance to design requirements. The product moving down the Can Opener assembly line must physically be moved through the test station before it is packed.

All Rival test equipment used for the safety test is equipped with both visual and audible signals to alert the

test operator if a failure is detected. The tester will not sequence to the function test if an electrical hazard is detected. The tester must be manually reset. The equipment and test method is as prescribed by Underwriters Laboratories Inc.

Specifically, the Model 731/1 Can Opener/Knife Sharpener undergoes the following tests prior to shipment:

1. Components of the motor (including the switch) must pass 100% safety and function tests.

2. The finished product, just prior to packaging, must pass 100% safety and function tests.

3. In addition to the above, quality control inspectors monitor finsihed production hourly. Each batch of parts, sub-assemblies and assemblies are also tested and/or inspected to assure that the production line are working properly.

All electrical safety equipment is verified for proper operation and calibration a minimum of twice daily by quality control personnel. (Exhibit "C").

QUESTION 26 — As to all tests or inspections identified in answer to Interrogatories 23 and 24, please state:

(a) The names of the persons who developed such tests indicating any industry or other standard to which said test conformed. (Exhibit "B").

ANSWER — See Number 22. (Exhibit "C").

QUESTION 31 — Please list and describe in complete detail each and every change in the design of similar products which have been made subsequent to the date of design of the product. (Exhibit "B").

ANSWER — None. (Exhibit "C").

QUESTION 40 — If the Defendant has within the past five years received any complaints of an occurrence similar

to that allegedly experienced by the Plaintiff, please state for each such complaint:

(a) Its date;

(b) Its substance, including a description of the factual circumstances;

(c) The name and address of the person making the complaint.

ANSWER —

a. December 7, 1976.

b. The claim was for property damage to a house. It was alleged that a Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. The evidence did not support the claimant's allegations, the claim was denied by the Company and dropped by the Claimant.

c. This was a subrogation claim by State Farm Fire and Casualty Company, 5725 Foxridge Drive, Chawnee Mission, Kansas, 66202. (Exhibit "C").

12. On or about April 10, 1980, the Defendant also answered the Plaintiff's expert interrogatories. The pertinent questions and answers are as follows:

QUESTION 10 — Identify any and all documents, agreements, plans, diagrams or blueprints which are in any fashion relevant to this cause of action by subject matter, date of other description.

ANSWER — The Report of John Reed Davis; any and all documents, agreements, plans, diagrams or blueprints to this action through Discovery procedures.

QUESTION 11 — Identify by name, address, job title and employer the identity of any individuals who you may know to have any knowledge concerning the facts and circumstances of this accident and the events leading up thereto.

ANSWER — This information exclusively lies in the possession of Plaintiff. (Exhibit "D").

QUESTION 12 — State whether you have contacted, discussed or interviewed any witnesses who have any knowledge or information of circumstances or facts pertaining to the claim or defense. If so, state: (Exhibit "D").

ANSWER — All witnesses have been interviewed in deposition attended by all parties. (Exhibit "D").

QUESTION 12(a) — Names, addresses and employer's addresses of all witnesses. (Exhibit "D").

ANSWER — No answer. (Exhibit "D").

QUESTION 12(b) — Names, addresses and employer's addresses of all persons who contacted the witness. (Exhibit "D").

ANSWER — No answer. (Exhibit "D").

QUESTION 12(c) — Whether or not a statement was obtained; and if so, whether said statement was recorded including the date thereof and by whom the statement was recorded.

ANSWER — No answer.

QUESTION 12(d) — State the substance in detail of all such statements of any witnesses who have any knowledge of the pending claims or defenses in the above-captioned matter.

ANSWER — No Answer.

QUESTION 12(e) — Will you attach a copy of all statements without a Motion to Produce?

ANSWER — No Answer.

QUESTION 13(a) — State the names and homes and business addresses of all persons who have conducted investigations, tests, inspections or examinations with respect to the accident or occurrences which are the subject matter

of this litigation and state for each such person their occupation, training, experience and areas of purported expertise.

ANSWER — John Reed Davis and Crippin Laboratories conducted tests on behalf of Defendant, Rival Manufacturing and a report has already been furnished to Plaintiff. Investigations performed identification of all persons who may have conducted investigations.

QUESTION 13(b) — State the dates, times and place of each investigation, test inspection or examination performed by any of the individuals named in the answer to Interrogatory No.: 13(a).

ANSWER — See Answer to Interrogatory Number 13(a). (Exhibit "D")

QUESTION 13(c) — State completely what procedures were used to perform any investigations, tests, inspections or examinations and provide a complete description of the investigation, test, inspection or examination, including what specifically was investigated, tested, inspected or examined. (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 13(a). (Exhibit "D")

QUESTION 13(d) — State in detail the results of each investigation, test, inspection or examination and if such results were obtained by other than the individuals listed in Interrogatory No. 13(a), state the names and home and business addresses of such persons along with their occupation, training, experience and areas of purported expertise. (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 13(a). (Exhibit "D")

QUESTION 13(e) — State whether any written reports exist with respect to any investigation, test, inspection or

examination and indicate its location (complete address), custodian and the preparers of such reports.

ANSWER — See Answer to Interrogatory Number 13(a). (Exhibit "D")

QUESTION 13(f) — If you will do so without requiring a Motion to Produce, attach a copy of any report from any investigation, test, inspection or examination. (Exhibit "D")

ANSWER — See Answer to Interrogatory Number 13(a). (Exhibit "D")

QUESTION 14(a) — State whether at any time prior to the accident or occurrences which are the subject matter of the claims and defenses herein, any investigation, tests, inspections, or examinations were conducted with respect to or relevant to or relate to, concern or touch upon in any way the accident, occurrences, instrumentalities systems, product, components, component parts, premises or personnel which are the subject matter of this litigation.

ANSWER — Answering Defendant understands this Interrogatory to refer to its product. The details of testing procedures for such product have already been supplied in Answers to prior Interrogatories. (Exhibit "D").

QUESTION 14(b) — State the dates, times and places of each investigation, test, inspection or examination which you listed as being performed in your response to Interrogatory No. 14(a).

ANSWER — See Answer to Interrogatory Number 14(a). (Exhibit "D").

QUESTION 14(c) — If any investigation, tests, inspections, or examinations were conducted as set forth in Interrogatory No. 14(a), state the names and home and business addresses of all persons who have conducted such investigations, tests, inspections or examinations and with respect to each person, state their occupation, experience and areas of purported expertise. (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 14(a). (Exhibit "D").

QUESTION 14(d) — State completely what procedures were used to perform any investigations, tests, inspections or examinations which you listed as being performed in your response to Interrogatory Number 14(a). (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 14(a). (Exhibit "D").

QUESTION 14(e) — State in detail the results of each investigation, test or inspection which you listed as being performed in your response to Interrogatory Number 14(a) and if such results were obtained by individuals other than those mentioned in Answer to Interrogatory Number 14(c), state such other persons' names and their home and business addresses, occupations, training, experience and areas of purported expertise. (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 14(a). (Exhibit "D").

QUESTION 14(f) — State whether any written reports or records exist with respect to any investigations, tests, inspections or examinations, which you listed as being performed in your response to Interrogatory Number 14(A). If such reports or records exist, state their location (complete address), custodian and the preparers of such reports or records. (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 14(a). (Exhibit "D").

QUESTION 14(g) — If you will do so without requiring a Motion to Produce, attach hereto a copy of any reports or records from any investigation, tests inspection or examination which is listed as being performed in your response to Interrogatory Number 14(a). (Exhibit "D").

ANSWER — See Answer to Interrogatory Number 14(A). (Exhibit "D").

13. The Co-defendant, S. Klein Department Stores also served Interrogatories on the Defendant, Rival and Rival answered S. Klein's Interrogatories by September 14, 1979. The pertinent questions and answers are as follows:

QUESTION 11— Do you allege that the condition of the product complained about by the Plaintiff, Sylvia Averbach, was not capable of detection by testing or inspection? (Exhibit "E").

ANSWER — Answering Defendant has denied that its product was defective and notes that its product meets or exceeds the industry standards. (Exhibit "F").

QUESTION 12 — Are there any standards of inspection or testing existing within the industry with regard to comparable or similar products? If so, please state them in detail and state to what extent answering third-party Defendant adhered to them? (Exhibit "E").

ANSWER — Rival Model 731/1 Can Opener/Knife Sharpeners are produced in accordance with Underwriters Laboratories Inc., Standard no.; UL982 Motor-Operated Household Food Preparing Machines. Rival's company standards meet or exceed the Underwriters Laboratories, Inc. standard. (Exhibit "F").

QUESTION 15 — As to all Federal, state or local regulations or industry standards regulating the sale of the product or similar products, please state the names or titles of said regulations or standards, how and in what manner said standards regulate or define the quality required of similar products. (Exhibit "E").

ANSWER — See Answer to Interrogatory Number 12. (Exhibit "F").

QUESTION 19 — Has the answering third-party Defendant received any complaints of injury or property damage or other unusual occurrence similar to those allegedly experienced by the Plaintiff, Sylvia Averbach, during the following time periods:

(a) prior to March of 1973;

(b) between March, 1973 and April, 1977;

(c) after April, 1977.

If so, please state for each complaint its date, its nature and substance of the complaint, including a description of the factual circumstances, and the name, address and telephone number of each person and/or entity making the complaint, and the action taken by answering third-party defendant regarding each complaint.

ANSWER — There was a claim made for property damage to a house which occurred on December 7, 1976. It was alledged that a Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. The evidence did not support the claimant's allegations, the claim was denied by the company and dropped by the claimant. This was a subrogation claim by State Farm Fire and Casualty Company, 5725 Foxbride Drive, Shawnee Mission, Kansas, 66202.

QUESTION 25 — Has any batch, lot shipment or any quantity of the product listed and identified above ever been recalled by yourself, by any State or Federal agency? If so, please state the date of such recall, the reason for such recall, the period during which each product recalled was manufactured, and the amount recalled. (Exhibit "E").

ANSWER — No. (Exhibit "F").

14. In Rival's Pre-Trial Memorandum, the Defendant made the following statement:

"Absent proof that the Defendant's product was the cause of the fire, Plaintiff cannot recover under Section

402A of the Restatement of Torts, since it cannot be said that Defendant's product presented an unreasonable danger which was in fact the cause of the fire.

Moreover, Defendant's product meets or exceeds all standard testing programs and each unit is individually tested before shipment. The product as designed and manufactured is completely safe for use, and warnings that a fire might occur within the vicinity of use Defendant's appliance would be completely superfluous. Lack of such warnings would not make the product unreasonably dangerous. Defendant's product functioned precisely in the manner for which it was intended until it was destroyed by fire from another source. Furthermore, Defendant, Rival Manufacturing Company's product was merchantible by UCC definition." (Exhibit "G").

15. On Februry 24, 1978, counsel for the Plaintiff wrote to the Consumer Product Safety Commission inquiring of other fire incidents involving the Rival can opener and he did not receive a response. (Exhibit "H").

16. On or about June 6, 1981, a jury found in the Defendant, Rival's favor and Judgment was entered for the Defendant, Rival by Judge Van Artsdalen.

17. The Plaintiff did not take an appeal from this Judgment.

18. During August, 1983, as a result of a telephone conversation with the Consumer Product Safety Commission, it was learned that there may indeed be fire incidents regarding the can openers. The telephone call was initially for an unrelated case.

19. On August 11, 1983, Plaintiff's counsel again wrote to the Consumer Products Safety Commission requesting information on the Rival can openers. (Exhibit "I").

20. Subsequently, counsel was advised that the request was being processed. (Exhibit "J").

21. Subsequent to April 17, 1984, counsel was advised that Rival would review the request. (Exhibit "K").

22. Subsequent to June 15, 1984, the Plaintiff's counsel received the Consumer Product Safety Commission (CPSC) records on Rival Electric can opener fires. (Exhibit "L").

23. The records reveal that Rival was aware of the CPSC's investigations during 1974: (Exhibit "L-18).

"UNITED STATES GOVERNMENT CONSUMER PRODUCT SAFETY COMMISSION MEMORANDUM
TO: Harold E. Snyder, ASCSO, MCI-AO

FROM: William F. Brockman, CSO, MCI-AO

DATE: February 8, 1974

SUBJECT: Request of 2/5/74 from Mr. John D. Rogers, BCMI concerning potential fire hazards presented by Electric Can Openers, Manufactured by Rival Manufacturing Co. of Kansas City, Missouri

On 2/8/74 my credentials and a Notice of Inspection were presented to Mr. William Chappell who identified himself as the Manager of the firm's Engineering Department. The nature and purpose of this investigation was explained to Mr. Chappell who stated that he has been designated by the firm as its liaison with the Commission. All discussions were held with Mr. Chappell who was the individual who supplied me with all of the necessary information pertinent to this investigation. The following information was obtained as a result of this investigation."

24. The records reveal that from 1968 to 1974, Rival had 23 complaints of fires: (Exhibit "L-13").

"The complaint file, for this firm, was reviewed with respect to complaints received concerning can openers or can opener combinations involved in fires. Mr. Chappell stated that all complaints or inquiries are received or channeled to the main offices in Kansas City as it is this location which has the responsibility to maintain such a file. No complaints prior to 7/22/68 were present in this file with respect to the specific products in question. (THIS INFORMATION IS CONFIDENTIAL).

A total of 23 complaints, concerning can openers or can opener combinations involved in fires, were noted. These

complaints covered a period from 7/22/68 to 1/11/74. In the case of all complaints, with one exception, Rival products are allegedly involved. The exception was a complaint of 3/15/69 where a product of unknown manufacture was cited. In nine of the complaints no correspondence was available, however correspondence on the remaining fourteen complaints was reviewed and copies collected."

25. Rival was aware that the can openers would remain on and create a "possible fire hazard"; (Exhibit "L-14").

"The first product modification involved the switch present in all series. (See Exhibit 2D for the schematic of series 782/1 which shows this switch as indicated by a red arrow). UL tests conducted under abnormal conditions (20,000 cycle tests) indicated that occasionally the product would continue operating after it was "shut off", thus creating a possible hazard."

26. Rival was aware that continued use would create a fire hazard. (Exhibit "L-15").

"The second product modification also took place in the later part of 1969 and was initiated as a result of test results received from UL. In these tests the rotor of the motor used in the products is locked in place and current is applied. In most cases the circuit was broken in 20 to 30 minutes, however in some tests the product would continue to operate three or four hours. Over this period of time sufficient heat was attained in the motor to melt the nylon bobbin to the motor which dripped on the styrene case of the product presenting a fire hazard."

27. Rival made modifications to its product to reduce the hazard. (Exhibit "L-15").

28. During 1975, two more fires were brought to Rival's attention. (Exhibit "L-29").

"An electrically operated can opener spontaneously ignited while not in use. The fire damaged that kitchen counter, wall and extended to wood cabinets over the

counter. The victim (owner) extinguished the fire by throwing water on it. There were no injuries. (Exhibit "L-29").

The investigator said he felt the operating lever of the can opener lying on the pole, closed the contacts enough for the opener to run very slowly. After a long period of running the motor and/or plastic wheel in the center of the mechanism overheated and ignited.

This is one of a number of fires involving a can opener of this type the writer is aware of." (8/17/75 Fire Exhibit "L-30").

"The Fire Investigator stated that there was no question in his mind that the fire originated from the electric can opener. The "cone" of damage pointed to the area on the kitchen counter top where the electric can opener was located. (See Photo 4) Nothing else was within approximately 2 feet of the can opener on the counter top. The can opener was more heavily damaged than other items in the kitchen also. The wall behind where the can opener was sitting sustained the worst structural damage in the mobile home. The can opener melted and stuck to the plastic type counter top. Part of the counter top had to be forcibly torn out in the effort to remove the can opener from the mobile home." (10/20/75 Fire Exhibit "L-35")

29. During 1976 Rival was advised of two more fires. (Exhibit "L-41"):

"This office has received two reports indicating that can openers which you manufacture caught fire with no apparent outside intervening cause."

30. During 1980 there were Rival can opener fires reported in California, Chicago and Philadelphia. (Exhibit "L-43").

"The complainant stated that this can opener had been presented to the family as a Christmas gift six (6) months

ago. He stated that the appliance had operated without incident until this date. The complainant stated that the family was unaware that this activity might be dangerous. He stated that no safety precautions had been taken to prevent such an accident. However, he stated, the can opener was not plugged in "at all times". The complainant stated that the unit was only plugged in when it was about to be used. He stated that all family members were experienced with the use of the product and had performed use of the product a number of occasions. He stated that the unit sat on a counter under some kitchen cabinets near a window. He further stated that on the day of the accident the curtains from the window were not in place.

He stated that his wife was the only person in the kitchen this particular morning. He stated that she was in good condition (not handicapped or under the influence).

The consumer stated that his wife plugged the unit into the wall outlet to use the unit to open a can. The consumer stated that his wife received a phone call from a neighbor just after she plugged in the can opener and before she could use it. He stated that his wife talked on the phone a few moments, hung up the phone, and went to the neighbor's house. He stated that his wife was at the neighbor's house approximately fifteen (15) minutes.

ACCIDENT:

The consumer stated that as his wife returned from her neighbor she was walking down the street and saw flames coming out the kitchen window.

POST-ACCIDENT

The complainant stated that his wife threw a bucket of water on the flaming unit. At this time, hearing the commotion, the complainant ran to the kitchen. He stated he and another fellow "put the fire out". The consumer stated that the cord and plug to the can opener were in good shape, i.e., the cord and plug were not damaged by the fire. He

stated that the entire can opener was a "Blob of metal and plastic." (7/1/80 Fire Exhibit "L-44").

"Can opener burst into flames while not in use. Complainant was home and extinguished fire." (9/15/80 Fire Exhibit "L-45").

"The owner of the can opener said that on 6/6/80, she and her son were asleep in the apartment. She said that at approximately 0900, she woke up and found her bedroom full of smoke. She said she got up and went into the kitchen and saw curtains on fire, and then noted a fire on the counter top where the can opener was located." (6/6/80 Fire Exhibit "L-47").

"Can opener caught fire and caused fire in kitchen of apartment owned by complainant." (date unknown — Chicago Exhibit "L-48").

The fire department arrived and put out the fire. According to the fire investigator the fire was started by the can opener. He had collected the can opener from the fire department and sent it to a private testing laboratory. The laboratory report indicated the following:

1) the fire started in the switch of the unit,

2) the unit housing was made of a readily ignitable material,

3) this same material supported and surrounded a non-rugged sparking switch.

Product Identification

The product is a Rival can opener/knife sharpener, model #738, Serial No. 65301. Label on the bottom reads, "control #738-703, Serial No. 0601", manufactured by Rival Mfg. Co., Kansas City, Mo. 64129." (9/10/80 Fire Exhibit "L-50").

31. There were also reports of fires after the trial date of June 6, 1981, during 1981 and 1982.

32. There were also reports of several can opener fires in Pennsylvania prior to 1974, but it is uncertain if Rival was aware of these fires. (Exhibit "L-18").

33. It is clear from the foregoing evidence that Rival was not candid with the Plaintiff during the discovery process.

34. Had Rival been truthful in its answers to Interrogatories, the Plaintiffs could have presented to the jury the fact that the Rival can opener fires were a common and a serious problem known to Rival.

35. Clearly, there could have been a different jury verdict had the jury been presented with the truth that Rival can openers ignite and cause fires.

COUNT ONE: RICO VIOLATIONS

36. The allegations contained in paragraphs 1 through 35 inclusive are hereby realleged as though fully rewritten herein.

37. Defendant has engaged in a pattern of "racketeering activity" as that phrase is defined by 18 U.S.C. Section 1961(1)(B) in that its wrongful conduct as set forth herein has violated Title 18 of United States Code, Section 1341 (relating to mail fraud), and Section 1343 (relating to wire fraud).

38. By virtue of the operation of their scheme to deceive, defendant in effect defrauded the plaintiff, and corrupted the Courts of the Eastern District of Pennsylvania which Courts are an "enterprise", whose activities affect interstate commerce, as that terms is defined by 18 U.S.C. Section 1964(4).

39. The acts and omissions of defendant described herein plainly constitute a scheme or artifice reasonably calculated to deceive persons of ordinary prudence and comprehension.

40. On more than two occasions, within the past 10 years, defendant, by and through its authorized agents, servants, officers, or employees, did cause the United States mails to be used in furtherance of the above-described fraudulent scheme by:

(a) causing things, such as letters, discovery answers, and other documentary materials to be placed in the United States mails for delivery by this postal service;

(b) taking some or all of the aforesaid documentary materials from the United States mail;

(c) acting in furtherance of the aforesaid fraudulent scheme with knowledge that use of the United States mails would follow therefrom in the ordinary course of business, all of which was in violation of 18 U.S.C. Section 1341 (Mail Fraud).

41. On two or more occasions within the past 10 years defendant did transmit or cause to be transmitted by means of interstate wire, sounds and conversations, for the purposes of executing and furthering the above described fraudulant scheme by making or receiving, or causing to be made or received, interstate telephone calls relating to discovery and trial of the aforesaid manner

42. At all times relevant hereto, defendants were each a "person", as that term is defined by 18 U.S.C. Section 1961(3), in that it is a legal entity "capable of holding a legal or beneficial interest in property."

43. As a result of the foregoing pattern of racketeering activity, plaintiff has suffered economic injury and detriment.

COUNT TWO: FRAUD

44. The allegations contained in paragraphs 1 through 43 inclusive are hereby realleged as though fully rewritten herein.

45. Subsequent to trial, and one year therefrom, plaintiff learned that defendants have jointly and severally wrongfully and fraudulently withheld extremely relevant and crucial evidence from plaintiff.

46. As a result of this wrongful and fraudulent withholding of evidence, plaintiff, the Court and the jury were deceived.

DEMAND FOR JURY TRIAL

47. Plaintiffs demand a trial by jury of all issues so triable in this case.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. The Court enter all necessary and appropriate declaratory and injunctive relief.

B. This Court enter final judgment against defendant

1. Declaring that defendant's actions were wrongful and unlawful as set forth herein;

2. Award actual damages, as well as punitive and/or triple damages against defendant, pursuant 18 U.S.C. Section 1964, respectively;

3. Granting such other and further relief as may be necessary to minimize the harmful consequences of delay in discovering the wrong complained of herein, and as may otherwise be deemed necessary, just and proper;

C. This Court grant such other relief as may be deemed just and proper.

D. Plaintiff recovers the costs of this suit, together with reasonable attorneys' fees.

O'BRIEN & O'BRIEN ASSOCIATES

Dated:_____ By:_____

JOHN J. O'BRIEN, III
1260 Suburban Station Bldg.
Phila., PA 19103
(215) LO7-7381

and

ALLAN KANNER & ASSOCIATES

By:_____

ALLAN KANNER
ALLAN KANNER & ASSOCIATES
1718 Locust Street
Philadelphia, PA 19103
(215) 546-6661

Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4316

A. H. RECOULLEY, JR. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiffs-Appellants,

v.

RIVAL MANUFACTURING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for Western District of Louisiana

(March 23, 1987)

ON PETITION FOR REHEARING

Before REAVLEY and RANDALL, Circuit Judges, and WOODWARD*, District Judge.

PER CURIAM:**

The plaintiffs argue persuasively that there is reason to believe that proper discovery opportunity would enable them to present significant evidence on the defectiveness of the can opener, and that the lateness of this attempt to obtain discovery prior to the trial was justified by the deposition answers of the Rival representative, Fred Jesse. We believe the district court

* District Judge of the Northern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

should be given the opportunity to set a program of further discovery and then to proceed under Rule 59 to consider whether a new trial should be granted or whether the prior judgment should be reopened for additional testimony and amended findings and new judgment in accord with Rule 59.

We therefore grant rehearing and remand the cause to the district court to proceed accordingly. After that court disposes of the case on the remand, if appeal is taken, the clerk of this court shall refer it to the present panel.

REMANDED.

Rule 59. New Trials: Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judtgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stiuplation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 86-4316

A. H. RECOULLEY, JR. and ST. PAUL
FIRE & MARINE INSURANCE COMPANY,
Plaintiffs-Appellants,

v.

RIVAL MANUFACTURING CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana
(CA-83-1782)

(February 24, 1987)

Before REAVLEY and RANDALL, Circuit Judges, and WOODWARD*, District Judge.

REAVLEY, Circuit Judge:**

Plaintiffs A. H. Recoulley, Jr. and St. Paul Fire and Marine Insurance Company (St. Paul) sued for damages from a fire in Recoulley's residence, and after a bench trial appeal from the district court's judgment in favor of defendant Rival Manufacturing Company. Recoulley and his insurer, St. Paul, alleged that the fire was caused by a defect in a can opener manufactured by Rival. The district court, however, found that plaintiffs did

* District Judge of the Northwestern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

not prove that the can opener was defective nor that it was a cause of the fire, In this appeal, Recoulley argues that he did prove these things, and that the trial court erred in failing to grant a continuance based on plaintiff's eleventh hour discovery or erroneous deposition answers given by a representative of defendant. We affirm.

Facts

At approximately 11:00 A.M. on December 27, 1982, all the electricity in the Recoulley residence was stopped. When the family returned home from a restaurant at 7:00 P.M., the kitchen was ablaze. St. Paul paid Recoulley for the resulting damages to the residence, and took subrogation.

Several experts testified at trial as to the probable cause of the fire. Plaintiff called Mr. William Lute, who opined that the fire originated in the area on the kitchen counter where the can opener, coffee pot and microwave oven were located. Mr. Melville Zemek then testified that in all probability the can opener motor was on until it burned out the motor coil, causing the fire. Defendant called Captain Hart, who was in charge of the fire crew answering the call to the Recoulley residence. He testified that the area above the stove was burned more severely than any other area of the kitchen and that he filed a report concluding that the fire originated due to a short circuit in the vent-a-hood above the stove. F. A. Wegman, an insurance adjuster who had originally investigated the fire for St. Paul, testified that the cause of the fire was that "grease unattended on the range ignited with ensuing damages to the dwelling and contents." Mr. Fred Jesse, an engineer employee of Rival, testified that the can opener cannot be activated without manual pressing of an external lever. Two additional defense witnesses testified as to the safety features of the Rival can opener. Defense expert Dr. Leonard Adams, retired head of Electrical Engineering Department at Louisiana State University, testified that no one knows what started the fire.

Discussion

The district court applied Louisiana law to this diversity case. It cited Louisiana Civil Code article 2315 (West 1979) for the proposition that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." In *Hunt v. City Stores, Inc.*, 387 So.2d 585, 589 (La. 1980), the court held that

> [T]he plaintiff in a products liabilty suit must only prove that the product was defective, i.e., unreasonably dangerous in normal use; that the product was in normal use at the time the injury occurred; that the product's defect caused the injury; and that the injury might reasonably have been anticipated by the manufacturer. It is unnecessary to prove the manufacturer was negligent.

The district court in the instant case found that plaintiffs failed to carry their burden on both the first and the third elements of this test: they did not prove that the can opener was defective nor, assuming a defect, that the defect caused their injuries.

The court noted that conflicting testimony was presented at trial by the various experts on the issue of what originated the fire. It found the testimony of Dr. Adams to be the most credible; this testimony was that it was impossible to pinpoint the origin of the fire in light of the extensive damages.

Our standard for review of findings of fact in a bench trial such as this must be governed by federal Rule of Civil Procedure 52(a): "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Judged by this standard, the finding that Dr. Adams was the most credible of the expert witnesses may not be set aside on appeal. Indeed, Dr. Adams' testimony that it was uncertain where the fire started is bolstered by the fact that the testimony of the other experts was conflicting. We cannot say that the district court's findings on the issue of defect and causation were clearly erroneous.

Plaintiffs complain further of the denial of the motion for continuance. Approximately two years before trial, plaintiffs took the depostion of Mr. Fred Jesse, a representative of Rival. He was asked how many prior claims of can opener induced fires existed to his knowledge. He replied "two or three" and added that he did not believe that at the time any were "involved in litigation." Six days before the scheduled trial date, plaintiffs; counsel came across the case of *Averbach v. Rival Manufacturing Company*, a product liability action in the United States District Court for the Eastern District of Pennsylvania. After the trial in *Averbach*, Averbach's counsel became aware that Rival had known of twenty-six consumer complaints to the Consumer Product Safety Commission regarding Rival can openers. Counsel for Averbach forwarded information from the Commission to counsel for Recoulley, who thereupon filed a motion for a continuance. In addition, Recoulley issued a subpoena duces tecum to the defendant requesting "all of the defendant's claims and files dealing with fires of can openers." The district court, however, granted defendant's motion to quash the subpoena, and denied plaintiffs' motion for a continuance. The court's grounds for denial were that the case had been set for trial four times, had been comtinued three times, and had been pre-tried twice; and that the discovery deadline had been set at 60 days before trial.

Plaintiffs argue that the denial of their motion for a continuance was an abuse of the trial court's discretion. They maintain that "a fair contest of the basic issues, including causation, would have required a continuance of this matter so that plaintiffs could have investigated the numerous claims of other fires with these can openers." We disagree.

The information regarding claims of other fires, which plaintiff received from counsel for Averbach, consisted of documents from the Consumer Product Safety Commission. After an inquiry into the prior claims of fires, however, that Commission notified Rival by letter in 1974 that "[w]e have concluded our investigation of the facts concerning the [electric can openers]. In view of the foregoing, Section 15 Group does not consider this

product to be one that could create a substantial product hazard." The district judge in the instant case admitted the Consumer Product Safety Commission reports into evidence at the close of the trial, while denying Rival's motion to leave the record open to allow cross examination as to these reports. We believe that, especially in light of the Safety Commission's letter, there was no warrant for hearing the contested issues of the prior claims of can opener malfunction. The court's consideration of the reports justified the denial of the continuance, but in the trial on the merits excluding the reports entirely would have been well within the trial judge's discretion under Federal Rule of Evidence 403.

Plaintiffs have called to our attention since oral argument that the Third Circuit has rendered its opinion in *Averbach v. Rival Manufacturing Co.*, No. 86-1196 (3d Cir. filed January 20, 1987). In *Averbach* the plaintiff, after having lost a jury trial on the contention that a Rival can opener caused a fire, then brought a new action and alleged common law fraud as a ground for relief from judgment. The district court entered an order dismissing the second action on the ground of lack of subject matter justidiction. The Third Circuit reversed, holding that the common law fraud count would permit proof of facts which could afford relief from a judgment.

While the defendant and the original claims were the same in *Averbach* as in the instant case, the issue presented in that appeal has no similarity to what is before us. In *Averbach*, as here, the plaintiff alleged that Rival was less than candid in its answers to interrogatories concerning the number of prior claims of can opener malfunction. The difference, however, is that in *Averbach* the Consumer Product Safety Commission reports were discovered by Averbach's counsel *after* a jury verdict had been rendered for defendant. The plaintiffs' allegations were assumed to be true and stated the harm of denial of an opportunity to impeach the defense witness with the reports and pursuit of other conceivable leads. In the present case the court has reviewed the Safety Commission documents prior to denying the plaintiffs' motion for a continuance based on thiose documents. Without there being any showing that a research of the prior

claims would have produced evidence that might have affected the outcome of this trial, the court cannot be faulted for its rulings.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1679

In The
Supreme Court of the United States
October Term, 1986

SYLVIA AVERBACH,

Petitioner,

v.

RIVAL MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, RIVAL MANUFACTURING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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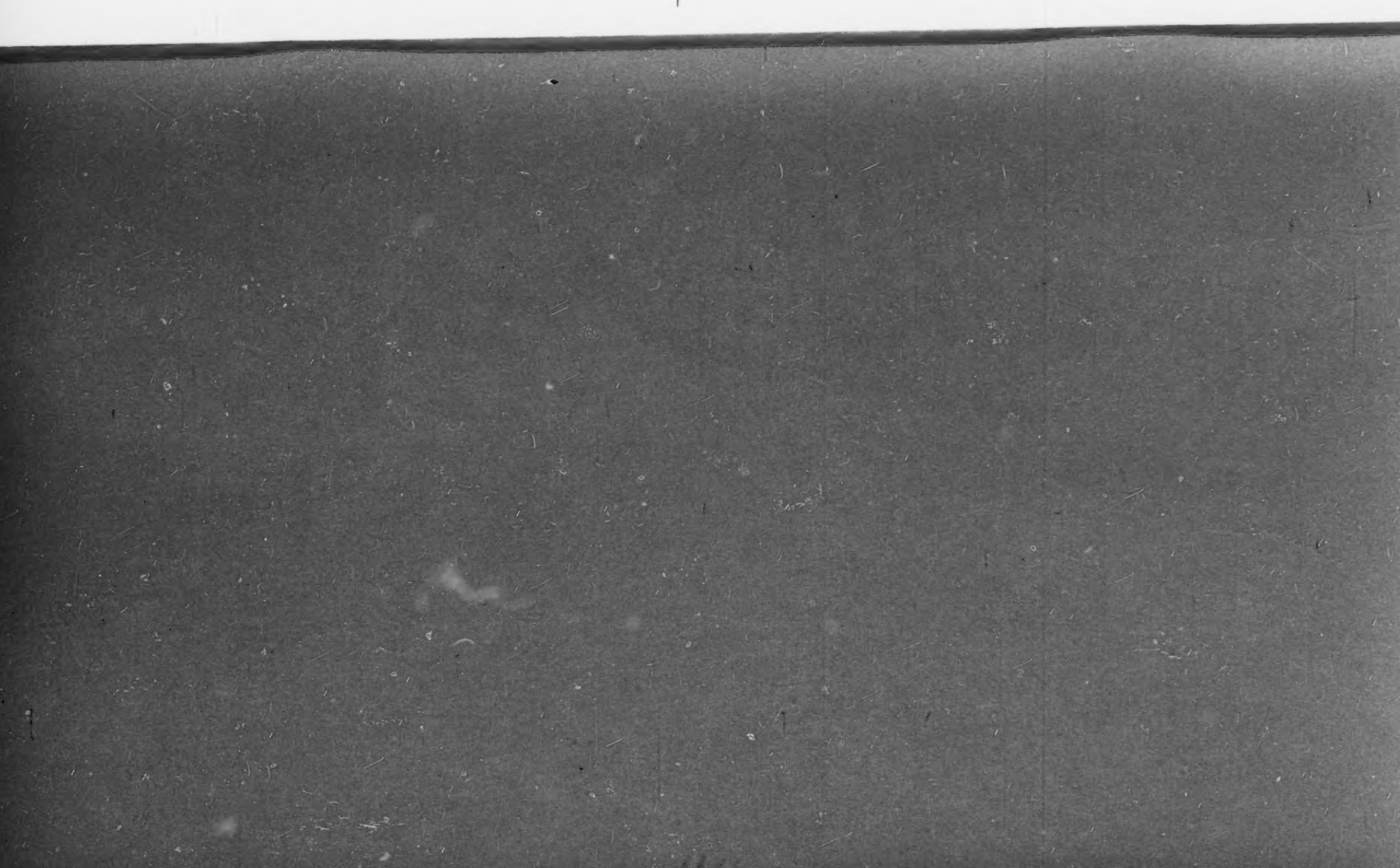

QUESTION PRESENTED

Did the District Court, as affirmed by the Court of Appeals for the Third Circuit, correctly conclude that a litigant did not conduct or participate in the conduct of the affairs of the United States District Court, the purported enterprise, under 18 U.S.C. § 1962(c) by allegedly failing to answer Interrogatories accurately in a products liability case?

RULE 28.1 LIST

The parent company of respondent is Rival Holdings, Inc. The only subsidiary of respondent which is not wholly owned is Bennington Properties, Inc. The respondent does not have any affiliated companies.

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No. 86-1679

In The

Supreme Court of the United States

October Term, 1986

SYLVIA AVERBACH,

Petitioner,

v.

RIVAL MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, RIVAL MANUFACTURING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Rival Manufacturing Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Third Circuit's Opinion concerning the RICO count of the Complaint.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 809 F.2d 1016 (3d Cir. 1987). The Opinion of November 18, 1985 of the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) has not been reported; it is reprinted in the Appendix attached to the Petition (A-14). The District Court's Order denying the petitioner's Motion for Leave to Amend the Complaint to allege obstruction of justice as a predicate act is reprinted in the Supplemental Appendix attached to this brief (S.A.-1). Judge Huyett's Opinion of March 11, 1986 is also not reported, and it is reprinted in the Supplemental Appendix (S.A.-2).

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JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331, and there was a pendent state law fraud claim. Additionally, there was diversity of citizenship even though jurisdiction on this basis was not alleged in the Complaint.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

STATEMENT OF THE CASE

On April 21, 1978, Sylvia Averbach (Averbach), instituted an action against Rival Manufacturing Company

(Rival) in the United States District Court for the Eastern District of Pennsylvania in an effort to recover damages for losses allegedly sustained during a fire to her home. She alleged that the fire was caused by a knife sharpener/can opener, Model No. 731/1, manufactured by Rival. Averbach forwarded Interrogatories which were answered by Rival, and she asked in Interrogatory No. 40 whether Rival had within the past five years received complaints of an occurrence similar to that allegedly experienced by her. Rival's answer was that it was aware of an occurence on December 7, 1976 in which it was claimed that Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. Rival denied that claim, and it was dropped by the claimant.

Rival also answered Averbach's Expert Interrogatories. In Interrogatory No. 14, Averbach asked whether, at any time prior to the occurrence which was the subject matter of that case, any investigation, test, inspection or examination was conducted with respect to the product. In its Answer, Rival stated that it understood that the Interrogatory referred to its product, obviously referring to Model 731/1 Can Opener/Knife Sharpener, and it referred to information which had previously been given.

Defendant, S. Klein Department Stores, also served Interrogatories upon Rival, and, in Interrogatory No. 19, it asked whether Rival had received any complaints of injury or property damage or other unusual occurrence similar to those allegedly experienced by Averbach. Rival again responded by referring to the incident of December 7, 1976.

On February 24, 1978, counsel for Averbach wrote to the Consumer Products Safety Commission (CPSC)

inquiring as to other fires allegedly involving Rival can openers, but no response was received.

Averbach's case proceeded to trial, and the jury found in favor of Rival on June 5, 1981. Judgment was entered on the verdict, and no appeal was taken by Averbach.

In August, 1983, counsel for Averbach learned from the CPSC in connection with an unrelated case that there may have been other fire incidents concerning can openers. Averbach's counsel wrote to the CPSC requesting information, and he subsequently received documents which are attached to the Complaint in the present action. According to Averbach's allegations, these documents indicate that complaints had been received by Rival concerning the alleged involvement of can openers in fire. From this information, Averbach concluded that Rival was not candid with her during the discovery process, that she could have presented to the jury the fact that Rival can openers were a common and serious problem known to Rival, and that there could have been a different jury verdict.[1]

On September 28, 1984, Averbach filed a Motion for New Trial under Federal Rule of Civil Procedure 60(b) and alleged that Rival had failed to answer Interrogatories accurately. The District Court denied Averbach's Motion, and this denial was affirmed by the Court of Appeals for

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1. In ruling upon the respondent's Motion to Dismiss, the District Court and the Third Circuit accepted as true all of the well-pleaded allegations of the Complaint. However, the respondent specifically denies that any Answers to Interrogatories were deceptive or incomplete, as they were truthful and they provided full, complete and accurate information.

the Third Circuit by Judgment Order on October 31, 1985. Averbach's Petition for Rehearing was denied on December 9, 1985.

The present action was filed in May, 1985, and the substantive allegations of Averbach's Complaint are identical to those of her Motion for New Trial. In Count One, Averbach alleges that she is entitled to recover under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*, because Rival had engaged in a pattern of racketeering activity, Rival had defrauded her and corrupted the Court of the Eastern District of Pennsylvania (which Court is alleged to be an "enterprise"), Rival had committed mail fraud in violation of 18 U.S.C. 1341 and wire fraud in violation of 18 U.S.C. 1343, and, as a result thereof, she has suffered economic injury and detriment. In Count Two, Averbach makes a common law fraud claim on the basis of allegations that Rival had fraudulently withheld relevant evidence from her and that, as a result of this conduct, the plaintiff, the Court and the jury were deceived.

Averbach filed a Motion for Leave to Amend the Complaint to allege obstruction of justice as a predicate act on September 9, 1985.

On November 18, 1985, the District Court dismissed the Complaint because Count One failed to state a claim upon which relief could be granted under RICO and specifically under 18 U.S.C. § 1962(c) in that Rival did not conduct or participate in the conduct or affairs of the United States District Court; the pendent state law claim in Count Two was dismissed because the Complaint did not allege jurisdiction based upon diversity of citizenship.

The Motion for Leave to Amend was denied because it did not cure the grounds for dismissal. Averbach then filed a Motion for Reconsideration and a Motion for Leave to Amend the Complaint in order to allege jurisdiction based upon diversity of citizenship. Both Motions were denied on March 11, 1986.

On appeal to the Court of Appeals for the Third Circuit, the dismissal of the RICO count was affirmed because of the Court's conclusion that Rival did not conduct or participate in the conduct of the affairs of the purported enterprise. The fraud count was reversed and remanded because of the Court of Appeals' conclusion that (1) the Complaint set forth the pleading requirements for a cause of action for fraud, (2) the requirements of an independent action under Rule 60(b) were met in that the elements for such an action are no different than those for a Motion for New Trial under Rule 60(b)(3), and (3) the "extrinsic/intrinsic" fraud distinction is not followed by the Third Circuit.

———o———

REASONS FOR DENYING THE WRIT

A. This case does not involve an issue in which there has been a conflict among the Courts of Appeals and it does not present any important question of law justifying review by this Court.

This case is based upon Answers which Rival gave to certain Interrogatories served by Averbach in a products liability action. The Interrogatories included definitions and instructions. Averbach is attempting to stretch this

discovery question into a claim that Rival engaged in a pattern of racketeering activity. Both the District Court and the Court of Appeals for the Third Circuit rejected her claim because Rival did not conduct or participate in the conduct of the District Court, as is required by Section 1962(c).

There is no claim by Averbach that the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of any other Court of Appeals. The decisions of the District Court and the Court of Appeals were based upon the specific facts of this case, and it is unlikely that review of the issue presented by Averbach will impact anyone other than the litigants. Accordingly, this case does not present any issue justifying review by this Court.

B. The District Court, as affirmed by the Court of Appeals, correctly concluded that Rival did not conduct or participate in the conduct of the affairs of the United States District Court, the purported enterprise, under 18 U.S.C. § 1962(c) by allegedly failing to answer Interrogatories accurately in a products liability action.

In order for a plaintiff to state a cause of action upon which relief can be granted for violation of Section 1962(c)[2] it must be alleged that he suffered injury because a person employed by or associated with an enterprise conducted or participated, directly or indirectly, in the conduct of such

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2. Averbach's Complaint does not mention Section 1962(c). However, it is clear from her Answer to Rival's Motion to Dismiss, her brief filed in the Third Circuit, and in her Petition for Writ of Certiorari that she contends that it is Section 1962(c) which was violated.

enterprise's affairs through a pattern of racketeering activity. Accordingly, the issue in this case is whether Rival conducted or participated in the conduct of the affairs of the United States District Court for the Eastern District of Pennsylvania by allegedly failing to answer Interrogatories accurately in a products liability action. The District Court and the Third Circuit correctly applied Section 1962(c) by holding that Rival's position as a mere litigant did not reach the level required to "conduct or participate . . . in the conduct of such enterprise's affairs". The language of Section 1962(c) requires that the defendant "conduct or participate . . . in the conduct" and not merely that it have some connection with the enterprise which does not reach this level of involvement.

Courts of Appeals and District Courts which have addressed this issue have found that the defendant's involvement with the conduct of the enterprise must be such that the defendant takes part in the enterprise's operations. This issue was discussed at length in *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), reversed on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). The Court of Appeals for the Fourth Circuit agreed with the District Court's conclusion that the "conduct or participate" language in Section 1962(c) requires "some involvement in the operation or management of an enterprise", *id.,* 591 F.2d at 1374, and it stated that

> [a]s the District Court said: "A comparison of the language [of the legislative history] used above to describe Section 1962(c) with the language of Section 1962(c) indicates that the words 'operation of any enterprise' were meant to describe the phrase 'conduct

> or participate, directly or indirectly, in the conduct of such enterprise's affairs.' "
>
> . . .
>
> We have reviewed the legislative history of 18 U.S.C. § 1962(c) and have concluded that the District Court was correct in its interpretation. We find additional support for its view in the use of the word "through" in the statute which would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business. Indeed, this connection must be shown if the word "through" is to have any meaning in the statute. Without the word "through", anyone who used income from illegitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c). We do not believe that Congress meant to sweep so broadly, ...

Id., 591 F.2d at 1375.

In *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983), cert. denied sub. nom. *Prudential Insurance Co. of America v. Bennett*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed. 2d 710 (1983), present and former residents of a retirement community brought a RICO action against several defendants because of alleged financial mismanagement resulting in the loss of "life care" which they expected to receive. The *en banc* Court stated that it was concerned ". . . that the Complaint may be deficient as failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant." *Id.* at 1364 (emphasis in original). The Court went on to state that

> [m]ere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause

> of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself. . . .

Id. See also *United States v. Zemek,* 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916, 985, 452 U.S. 905 (1981) (The Fourth Circuit's conclusion that the "conduct or participate" language in Section 1962(c) requires proof of involvement in the operation or management of the RICO enterprise is favorably cited); *Agristor Leasing v. Meuli,* 634 F.Supp. 1208 (D.Kan. 1986) (". . . [T]he 'person' committing the racketeering activity must have at least some involvement in the management or everyday affairs of the 'enterprise' in order to satisfy the 'conduct through' requirement." *Id.* at 1223); *John Peterson Motors, Inc. v. General Motors Corporation,* 613 F.Supp. 887 (D.C. Minn. 1985) ("A RICO defendant must play a more dominant, active ownership or management role than is alleged here." *Id.*, at 900).

In the present action, Averbach does not allege in her Complaint that Rival conducted or participated in the conduct of the affairs of the District Court, and she makes no allegation that Rival was involved in the operation, management or everyday affairs of the District Court. It is clear from her allegations that Rival was merely a defendant in a products liability case. The Third Circuit was correct in affirming the decision of the District Court that Rival did not conduct or participate in the affairs of the District Court and that its activities were not designed to corrupt the operations of the Court's own processes; it stated that

> [w]hereas litigants before courts call upon the courts to exercise the judicial process, they do not par-

> ticipate in it in the sense intended by Congress in 18 U.S.C. § 1962(c) (1982). Such litigants do not share with the Court's personnel a common purpose with respect to the activity complained of. Indeed, Averbach's allegations suggest that while those responsible for conducting Rival Manufacturing Company's defense of product liability litigation may have had a common or shared purpose, that purpose was quite at variance with those of the judges and support personnel of the District Court. If Averbach's allegations are true, no more occurred with respect to the enterprise in question then to mislead those who conducted it. That is not, in our view, equivalent to the participation in its affairs which is required by 18 U.S.C. § 1962(c) (1982).

Averbach's position is that this Court has stated that RICO is to be read broadly and that a broad reading would permit her to pursue her RICO count in this case. However, it would require a torturing of the language of Section 1962(c) to conclude that the District Court and the Third Circuit erred with respect to the dismissal of the RICO count, as the allegations of the Complaint simply do not meet the requirements of that section.

Finally, it is noted that Averbach states that "perhaps" the Courts below dismissed the RICO count because they found it to be defective under Rule 9(b). This is not an issue, as both the District Court and the Court of Appeals set forth their reasons that the RICO count did not state a claim upon which relief could be granted, and they do not refer to the pleading requirements of Rule 9(b).

———o———

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	CIVIL ACTION
v.	)	NO. 85-2794
	)	
RIVAL MANUFACTURING COMPANY	)	Filed Nov. 19, 1985
	)	

ORDER

NOW, November 18, 1985, upon consideration of plaintiff's motion for leave to amend her complaint and because:

I have granted defendant's motion to dismiss the original complaint. The proposed amended complaint does not cure the grounds for dismissal.

IT IS ORDERED that plaintiff's motion to amend her complaint is DENIED AS MOOT.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	CIVIL ACTION
v.	)	
	)	NO. 85-2794
	)	
RIVAL MANUFACTURING COMPANY	)	Filed Mar. 12, 1986

MEMORANDUM AND ORDER

HUYETT, J. March 11, 1986

This action arises from a products liability action which plaintiff filed almost eight years ago. In April of 1978, plaintiff filed her complaint alleging that an electric can opener manufactured by the defendant, Rival Manufacturing Company (Rival), malfunctioned and resulted in a fire that caused extensive damage to plaintiff's residence. The matter was tried in June of 1981, before Judge Van Artsdalen, and the jury returned a verdict in favor of the defendant. That judgment was not appealed.

In September of 1984, more than three years after entry of the judgment, plaintiff filed a motion for a new trial, pursuant to Fed.R.Civ.P. 60(b), alleging that Rival had not been forthcoming and honest in response to a discovery request of plaintiff. Specifically, plaintiff had asked defendant whether it had received other claims or complaints about Rival electric can openers causing fires. Defendant answered this in the negative. Plaintiff subsequently learned that Rival did have notice of other claims or complaints concerning its can openers. Rival contends that the other claims and complaints concerned different models and were therefore not relevant to plaintiff's action.

Plaintiff's Rule 60(b) motion was denied in February, 1985. That denial was appealed to and affirmed by the Third Circuit Court of Appeals in November, 1985.

In May 1985, plaintiff filed the complaint which is the subject of the present action, alleging that Rival's conduct with respect to plaintiff's discovery request was a violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, (hereinafter RICO), and constituted fraud under state law. Defendant filed a motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), which I granted by order dated November 18, 1985. The denial was based on my opinion that the RICO allegation was insufficient in that the defendant did not "conduct" or "participate" in the affairs of the United States District Court for the Eastern District of Pennsylvania, which plaintiff had alleged was the requisite "enterprise" under RICO. Plaintiff's complaint made no allegation of jurisdiction based upon diversity of citizenship and so I dismissed the pendent state law fraud claim as well.

Presently before me are plaintiff's motion for reconsideration of the order dismissing the complaint and plaintiff's motion to amend her complaint to allege diversity of citizenship.

MOTION FOR RECONSIDERATION

Plaintiff's motion for reconsideration will be denied because she presents no basis for concluding that my decision to dismiss the complaint was incorrect or improper. Plaintiff does, however, make certain comments that I feel obligated to address.

Plaintiff is under the misguided perception that I have no concern for perjury and fraud and have failed to un-

derstand the allegations made in plaintiff's complaint. I do have the utmost concern for perjury, fraud or any other device that is intended to sidetrack the proper administration of justice, and I do not take lightly allegations of such behavior. However, I have an equally pressing concern for the proper interpretation and application of the law.

I dismissed plaintiff's complaint because it failed to state a cause of action under the relevant provisions of RICO. Plaintiff's motion for reconsideration is devoid of any authority to suggest that my decision to dismiss the complaint was erroneous or improper. Plaintiff addresses RICO in one short paragraph and cites a case that simply is not relevant to this matter.[1]

In her motion for reconsideration, plaintiff expresses concern over my mention and alleged review of the appeal pertaining to plaintiff's unsuccessful motion pursuant to Fed.R.Civ.P. 60(b), and Judge VanArtsdalen's assessment of the merits of that motion. Plaintiff's concern is difficult to understand because I did not review the appeal mentioned by plaintiff nor did I rely upon the disposition of her Rule 60(b) motion. Both the Rule 60(b) motion and its subsequent affirmation on appeal were simply men-

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1. Plaintiff cites *Bennett v. Trust Co. of New York*, 770 F.2d 308 (2d Cir. 1985) as reaching a conclusion contrary to my holding that a litigant does not "conduct or participate" in the affairs of a court for purposes of RICO. *Bennett* involved an analysis of what constitutes an enterprise under RICO. Had plaintiff read footnote one in my memorandum opinion, she would have noted that I assumed *arguendo* that the district court was an "enterprise" for purposes of RICO. *Bennett* offers no opinion as to the "conduct" or "participate" requirement of RICO.

tioned to provide the reader of the opinion with an accurate case history.

In her supplemental memorandum of law, plaintiff offers the case of *Northeast Women's Center, Inc. v. McMonagle,* No. 85-4845, slip op. (E.D. Pa. October 25, 1985) as support for her contention that her complaint should not have been dismissed. Plaintiff's reliance on that case, however, is misplaced. The Northeast Wamen's Center, Inc. filed that action against a group of individuals alleging that the individuals had committed various criminal acts damaging plaintiff's property and business. Plaintiff's complaint included a RICO count; defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) which was denied by Judge Kelly in an order dated October 25, 1985.

Because the Northeast Women's Center complaint survived a motion to dismiss, plaintiff contends that her complaint should also survive a motion to dismiss. Unfortunately, the only similarity between these cases is that both involve RICO counts. Plaintiff contends that although the pro-life defendants in *Northeast Women's Center* did not "conduct" or "participate" in the affairs of the center, they were found to have disrupted the affairs of plaintiff's business activities.

First, contrary to plaintiff's assertion, Judge Kelly did not find that the defendants had disrupted plaintiff's business activities; rather, he denied a motion to dismiss, concluding that the allegations were sufficient to state a cause of action. More importantly, Judge Kelly did not address the issue of whether the defendants had participated or conducted in the affairs of the enterprise, but he

noted that the alleged enterprise had been described by the plaintiff as "a 'group of individuals who have entered into a conspiracy which has as its goal the destruction of plaintiff's business and property.' " *See* slip opinion, *Northeast Women's Center,* at 4. Therefore, the Women's Center was not the enterprise alleged by plaintiffs and it was irrelevant whether the defendants conducted or participated in the affairs of the center.

In this case, plaintiff has alleged that the United States District Court for the Eastern District of Pennsylvania was the enterprise; a necessary element to a RICO claim is that the defendant conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs . . ." 18 U.S.C. § 1962(c). Because defendant Rival does not conduct or participate in the affairs of the United States District Court for the Eastern District, I concluded that defendant's motion to dismiss should be granted. I have been presented with no reason or authority which would cause me to alter my prior decision.

MOTION TO AMEND COMPLAINT

Plaintiff has also filed a motion to amend her complaint to allege diversity of citizenship with respect to the state law fraud count.

Federal Rule of Civil Procedure 15(a) provides:

> Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by

> leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . .

In the present action, defendant filed a motion to dismiss before responding to plaintiff's complaint. A motion to dismiss [pursuant to Fed.R.Civ.P. 12(b)(6)] is not considered to be a responsive pleading for purposes of Rule 15(a). *Schnabel v. Bldg. & Construction Trades Council of Phila.*, 563 F. Supp. 1030, 1035 (E.D. Pa. 1983). Were it not for the fact that defendant's 12(b)(6) motion had been granted and an order dismissing the action entered, plaintiff would be entitled, as a matter of course, to amend her complaint. Once a motion to dismiss has been granted, however, a plaintiff does not have a right to amend a complaint but may do so only by leave of court. *Kelly v. Delaware River Joint Commission*, 187 F.2d 93 (3rd Cir. 1951), *cert. denied*, 342 U.S. 812 (1951), *Kauffman v. Moss*, 420 F.2d 1270 (1970).

While it is true that leave to amend will be freely given when justice so requires, *see* Fed.R.Civ.P. 15(a), leave will be denied where the proposed amendment does not cure the deficiency of the original complaint. *Hall v. Pennsylvania State Police*, 433 F. Supp. 385 (E.D. Pa. 1976). One standard for testing the adequacy of the proposed amended complaint is whether it states a claim sufficient to survive a motion to dismiss. *Dixon v. Pennsylvania Crime Commission*, 67 F.R.D. 425 (M.D. Pa. 1975). Using the 12(b)(6) standard as a guide, I must examine the proposed amended complaint, accepting as true all well-pleaded factual averments and construing it with all inferences in favor of plaintiff. *Jenkins v. McKeithen*, 359 U.S. 411 (1969), *Conley v. Gibson*, 355 U.S. 41 (1957).

The elements of fraud, under the common law of Pennsylvania, which governs the fraud count, are: (1) a misrepresentation of fact, (2) fraudulently uttered, (3) with the intent to induce action, (4) which action is taken upon justifiable reliance on the misrepresentation, (5) to the detriment of the injured party. *Thomas v. Seaman,* 451 Pa. 347, 304 A.2d 134 (1973). I find that plaintiff has failed to allege sufficiently the elements of common law fraud and consequently has not stated a cause of action that can survive a motion to dismiss. The complaint fails to allege that defendants intended to induce action on the part of plaintiff or that plaintiff justifiably relied upon the alleged misrepresentations. As a result of plaintiff's deficient pleading, leave to amend to allege diversity is therefore denied.

Defendant contends that plaintiff's complaint could also be dismissed because it does not satisfy the requirements of Fed.R.Civ.P. 60(b). This is an equally persuasive reason for not granting leave to amend.

Rule 60(b) provides six specific grounds for relief from judgment. Grounds 1, 2, 3 must be raised within one year of judgment, while grounds 4, 5 and 6 must be brought within a reasonable time. Ground 3 is directed to fraud, misrepresentation or misconduct of an adverse party and it would be the applicable grounds in the present case. Motions under 60(b) do not limit the power of the court to hear an independent action seeking relief from judgment or to set aside a judgment for fraud upon the court. The rule imposes no time limitation on the latter two procedures. However, to protect the integrity of the time limitations imposed by 60(b)(3), acts which constitute fraud,

misrepresentation, or adversarial misconduct cannot be raised, untimely, in an independent action. Consequently, if relief is sought by independent action alleging fraud, as it is here, the party seeking relief must allege something more substantial than the fraud to which 60(b)(3) is directed. For plaintiff successfully to seek relief from judgment for fraud, more than one year after entry of judgment, she must sufficiently allege "fraud upon the court." *See, Home Box Office, Inc. v. Spectrum Electronics, Inc.*, 100 F.R.D. 379 (E.D. Pa. 1983).

While plaintiff does not expressly seek relief from judgment directly, for all practical purposes, a successful independent action will effect relief from the earlier judgment. I am concerned that the policies and purposes of Rule 60 would be seriously compromised if plaintiff was allowed to proceed in this matter without regard to that rule.

The fraud allegedly perpetrated in this case was nondisclosure of allegedly relevant discovery information and perhaps perjury as a result thereof. This kind of misconduct does not amount to "fraud upon the court" and therefore plaintiff's action, judged by the standards of Rule 60, is deficient. *See, Petry v. General Motors Corp.*, 62 F.R.D. 357 (E.D. Pa. 1974); *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833 (5th Cir. 1980). In both *Petry* and *Kerwit*, the courts held that allegedly false and misleading answers to interrogatories and nondisclosure of pertinent facts to the adverse party or the court does not amount to "fraud upon the court." *Petry v. GMC*, 62 F.R.D. at 359, *Kerwit Med. Prods. v. N & H Instruments, Inc.*, 616 F.2d at 837. *Petry* further concluded

that perjury by a witness did not amount to "fraud upon the court." *Petry v. GMC,* 62 F.R.D. at 360-61. Fraud upon the court is found only where there has been the most egregious misconduct that involves a corruption of the judicial process itself. *Petry v. GMC,* 62 F.R.D. at 361, *citing, Lockwood v. Bowles,* 46 F.R.D. 625 (D.C. Cir. 1969).

The alleged misconduct in the present case which is substantially similar to that alleged in the above-cited cases, might constitute fraud under Fed.R.Civ.P. 60(b)(3). Such conduct, however, does not amount to "fraud upon the court," and it is therefore, subject to the one year time limitation imposed by Rule 60(b). If plaintiff were allowed to proceed with an independent action that alleged nothing more than Rule 60(b)(3) misconduct, the strict time limitation of Rule 60(b) would be rendered ineffective. Perhaps even more compelling is the fundamental purpose of Rule 60(b) which is to ensure the finality of litigation. That purpose is particularly evident in the present case.

For all these reasons, plaintiff's motion to amend her complaint is denied and this action is dismissed.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	
v.	)	CIVIL ACTION
	)	
	)	NO. 85-2794
RIVAL MANUFACTURING COMPANY	)	
	)	

ORDER

NOW, March 11, 1986, upon consideration of plaintiff's motion for reconsideration and motion for leave to amend, defendant's responses, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that

1. Plaintiff's motion for reconsideration is DENIED.

2. Plaintiff's motion for leave to amend is DENIED and this action is DISMISSED.

/s/ Daniel H. Huyett, 3rd, Judge